



**REPUBLIC OF KENYA**  
**IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT**

**AT VOI**

**ELECTION PETITION NO.2 OF 2017**

**GIDEON NDAMBUKI MUTHIANI.....PETITIONER**

**-VERSUS-**

**FRANK KICHOI.....1<sup>ST</sup> RESPONDENT**

**JOSEPH MWAFONDO.....2<sup>ND</sup> RESPONDENT**

**(MWATATE CONSTITUENCY RETURNING OFFICER)**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT**

**RULING**

The Petitioner herein, Gideon Ndambuki Muthiani, by a Notice of Motion application dated 13/11/2017, but filed in court on 14/11/2017, moved the court under Rules 12 (5), (6), (7) and 12 of the Election (Parliamentary and County) Petition Rules 2017 and all enabling provisions of the Laws of Kenya for the following orders;

- 1) That the affidavits sworn by the 1<sup>st</sup> Respondent herein dated the 27<sup>th</sup> September 2017 to be struck out.
- 2) That the Honorable Court be pleased to strike out response to an Election Petition by the 1<sup>st</sup> Respondent herein dated the 27<sup>th</sup> September, 2017
- 3) That the costs of the application be provided for

The Petitioner supported the application by the grounds set out on the face of the application, and the averments in the affidavit sworn by himself on 13/11/2017.

The Petitioner highlighted the grounds in support of the application as follows;

- a) That the affidavit by the 1<sup>st</sup> Respondent by the 1<sup>st</sup> Respondent dated 27/9/2017 is incurably defective in that the same was sworn and commissioned allegedly before Henry Muranje contrary to the provisions of the oaths and Statutory Declarations Act Cap 15 Laws of Kenya.

- b) That the alleged stamp used to seal the said affidavit by the 1<sup>st</sup> Respondent and the signature affixed thereof were forgeries.
- c) That the said affidavit by the 1<sup>st</sup> Respondent is in the circumstances, not an affidavit within the meaning of Law and cannot legally form part of the response to the Petitioner.
- d) That in the absence of an affidavit the response by the 1<sup>st</sup> Respondent dated 27<sup>th</sup> September, 2017 cannot legally stand on its own as required by rule 14 of election rules.
- e) That it is in the interest of justice and for expedient dispensation of justice that the orders sought be granted.

In the supporting affidavit, the Petitioner averred that the affidavit in support of the response by the 1<sup>st</sup> Respondent was fraudulently procured as having been sworn before and commissioned by one Henry Muranje Advocate and commission of oath Voi. That the said Henry Muranje has since denied being involved in any way with respect to the commissioning of the said affidavit of the 1<sup>st</sup> Respondent dated 27/9/2017

The Petitioner stated that the said Henry Muranje has specifically denied that the stamp used to commission the affidavit by the 1<sup>st</sup> Respondent dated 27/9/2017 does not belong to him. That the signature on the affidavit is a forgery. That the address in the said stamp i.e Number 8578-80100 Mombasa does not belong to him. That the said Henry Muranje was not in Voi or within Taita Taveta County to commission or sign the said document.

The Petitioner contended that Henry Muranje has in support sworn an affidavit to support the averments by the Petitioner. That the said Henry Muranje had written to various government agencies, institutions, including the court, as well as other individuals complaining of the illegal use of his stamp and forgeries of the signature. That the said Henry Muranje has also prepared a sample of his stamp and signature.

The Petitioner further averred that the said Henry Muranje was ready and willing to attend court if needed to be personally cross-examined over his affidavit filed herewith separately and independently.

The Petitioner averred that the said Henry Muranje had testified in court in Petition No. 1/2017 and the matter was pending ruling. That the affidavit by the 1<sup>st</sup> Respondent were not properly commissioned and therefore not an affidavit within the meaning of the law as required by rule 14 of the Election rules 2017, and the same should be struck out. That upon striking out of the affidavit, the response to the Election Petition would be unsupported by any affidavit and should therefore be similarly struck out. That the fraudulent and illegal acts on the affidavit by the 1<sup>st</sup> Respondent herein were deliberated and recklessly committed by the 1<sup>st</sup> Respondent's counsel who drew and commissioned the said affidavit. That the 1<sup>st</sup> Respondent had conspired with his advocates to commit the fraud and or illegality, and should therefore not be permitted to play victim of circumstances, and that he must bear the consequences of his own self-misfortune.

The 1<sup>st</sup> Respondent opposed the application. He filed a replying affidavit sworn on 21/11/2017 and filed in court on even date. The 1<sup>st</sup> Respondent contended that the Petitioner in making his application had placed reliance on information, the source of which is not a party to these proceedings. That the said Henry Muranje is a non-party to the Election Petition and lacks locus standi to make or dispute the averments herein.

The 1<sup>st</sup> Respondent stated that the allegation relating commissioning of the affidavits sworn by himself was under investigation by the relevant authorities. That hitherto there was no fault imputed even on himself or his advocates on record. The 1<sup>st</sup> Respondent contended that it would be prejudicial to him, if the court were to place reliance on the unsubstantiated claim, made by an individual not a party to the proceedings.

The 1<sup>st</sup> Respondent further submitted that the affidavits and response to the Election Petition are proper in law, meritorious and worthy of the courts consideration. That in case the court were to make a contrary finding herein it has the discretion to use the robust powers under Article 159(2)(d) of the constitution of Kenya and Section 80 (1)(d) of the Elections Act to disregard any technicality of procedure alleged by the Petitioner, consider the substance of the Affidavits and response to Election Petition, and make a determination thereof based on merit. That an Election Petition is a matter of Public interest, with stakes going far beyond parties to the petition and affecting the electorate in an entire voting jurisdiction, the totality of which makes the avenue of striking out his affidavits and the response to Election Petition too harsh an option.

The 1<sup>st</sup> Respondent too submitted that Rule 5 of the Petition rules, 2017, accords to the court the discretion to cure any failure of compliance with the rules, including granting him leave to file fresh affidavits in support of his response to Election Petition so as to meet the objective of the Rules 2017, and by extension, the objective of electoral dispute resolution.

The 1<sup>st</sup> Respondent too contended that the court is not unnecessarily fettered by timelines, well captured in Rule 21 of the Rules, 2017, and at the earliest, would seek leave of the court to file fresh affidavits in support of his response to the Election Petition. He urged the court in the interest of justice, and fairness, to refuse the orders sought in the application and dismiss the same.

The application was fixed for directions on 15/11/2017. The parties agreed to have it conversed on 21/11/2017. They agreed to have the same disposed of by way of oral arguments. In addition it was also agreed that one Henry Muranje the deponent of an affidavit sworn on 9/11/2017 and filed in court on 14/11/2017 be called to testify and be accordingly cross-examined.

On 21/11/2017 counsel for the Petitioner Mr.Mwinzi urged the application. He reiterated the grounds and averments in the affidavit in support aforementioned. He placed reliance on three authorities. The first authority is **Election Petition No.9/2017 David Wamatsi Omusotsi-Vs-Returning Officer, Mumias East Constituency and 2 others (2017) eKLR, Ismael Suleiman & Others –Vs- Returning Officers Isiolo County and 4 others (2013) KLR and Rajput –Vs- Barclays Bank of Kenya Ltd and 3 others (2004) KLR**

Mr. Aywa for the 1<sup>st</sup> Respondent simultaneously held brief for Mr. Omondi for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent. He opposed the application and basically reiterated the averments in the replying affidavit sworn by Frank Kichoi. He then proceeded to distinguish the authorities relied on by the Petitioner from the facts in this case. It was Mr. Aywa's contention that the strictness accorded to an Election Petition is not the same strictness guiding the filing of a response to an Election Petition. That there is no reference in the Act as to what would be the fate of a response to an Election petition which is not supported by an affidavit. He further stated that failure by a respondent in an Election Petition to accompany a response with affidavits is not as fatal as failure by a Petitioner to do the same.

I have carefully considered the rival submissions and arguments by both sides to this case. A number of issues have emerged for my determination and I frame them as follows;

- a) Whether it is mandatory for a response to an Election Petition to be accompanied by an affidavit(s)
- b) Whether an Election court is vested with the discretion to permit a party to file fresh affidavits in support of a response to an Election Petition.
- c) Whether the 1<sup>st</sup> Respondent's affidavit in support of the response to the Petition was properly commissioned.
- d) Whether the 1<sup>st</sup> Respondent's affidavit in support of the response to the Petition, and the response to the petition should be struck out.

I will commence by dealing with the first issue. This issue emerged out of the submissions by Mr. Aywa counsel on record for the 1<sup>st</sup> Respondent. In his reply to the submissions made by Mr. Mwinzi counsel of the Petitioner, he appeared to down-play the significance of filing a supporting affidavit to a response to an Election Petition. This is how counsel rendered himself;

**“ The strictness accorded to an Election Petition is not the same as the strictness guiding the filing of a response to an Election Petition. There is no reference as to what would be the fate of a response to an Election Petition which is not supported by an affidavit. Failure by a respondent in an Election Petition to accompany a response with affidavits is not fatal as failure by a Petitioner to do the same.”**

The filing of a response to an Election Petition is governed by Rule 11 of the Election Petition rules, 2017. The said provisions of the law states as follows;

**“ 1. Upon being served with a petition in accordance with rule 10, a Respondent may oppose the Petition by filing and serving a response to an Election Petition within fourteen days”**

The above section of the law, must be read with Rule 12(5) of the Election Petition rules, 2017. The said rule states as follows;

**“ A response to the Petition under rule 11 shall be supported by an affidavit sworn by the respondent”**

**6. Each person who the respondent intends to call as a witness at the hearing shall swear an affidavit.**

**7. A respondent shall at the time of filing the response to a petition, file the affidavit sworn under sub-rule (6)”**

My reading of the above rule is clear. A response to the Petition shall be supported by an affidavit. The rule is couched in mandatory terms. Indeed it is as essential to annex supporting affidavits to a response to an Election Petition, as is annexing affidavits in support of an election petition itself.

The next issue is whether the court is vested with the discretion to allow a party to file fresh affidavits in support of a response to an Election Petition. This issue was necessitated owing to the submissions by Mr. Aywa that should it not find favour in disallowing the application, it can grant leave to the 1<sup>st</sup> Respondent to file a fresh affidavit in support of his response to the Petition herein. Mr. Aywa seems to have placed reliance on Rule 5 of the Petition rules 2017. The said rule states as follows;

**“ (1) The effect of any failure to comply with these rules shall be determined at the court’s discretion in accordance with the provisions of Article 159(2) of the constitution.”**

The filing of an Election Petition is governed by both the Constitution of Kenya 2010 and the statute. ( See Article 87 (2) of the constitution and section 76 (1) (a) of the Elections Act 2011). They have clearly given timelines within which to file a Petition. Rule 11(1) of the Petition rules 2017 as read with Rule 12 (5) of the same rules, gives the timeline for a Respondent to file his response, and supporting affidavits. The above provisions of the law are conceded in mandatory terms, hence signifying their inflexibility. Indeed the court is vested with wide direction, but it must always exercise the same judiciously and as per law ordained. In any case, there was no clear request by the 1<sup>st</sup> Respondent seeking to file fresh affidavit in support of the response to the Election Petition.

Having stated the above, I now move to the third issue. That issue is whether the 1<sup>st</sup> Respondent’s affidavit sworn in support of his response to the Election Petition was properly commissioned as per the provisions of the oaths and Statutory Declarations Act. Mr. Mwinzi urged the court to make a finding that the affidavit was not properly commissioned as Mr. Muranje, counsel who is said to have

commissioned the same has since filed an affidavit dissociating himself for the said commissioning.

Mr. Mwinzi relied on three authorities. The first one is **Election Petition No.9/2017 David Wamatsi Omusotsi –Vs- the Returning Officer Mumias East Constituency & 2 Others (2017) eKLR**. In the said case, the Petitioner's affidavits were said to have been commissioned by a firm of advocates and not an individual advocate appointed as a commissioner for oaths. That as clearly submitted by Mr. Aywa counsel for the 1<sup>st</sup> Respondent distinguishes that authority from the facts of the case herein.

Mr. Mwinzi in his list of authorities had mentioned two more authorities, but he did not furnish copies of the same to the court. He too did not make any submissions to the court as to the contents, subject matter and findings. The court would therefore have no much to say about them.

The case before me is clear. Filed alongside the 1<sup>st</sup> Respondents response to the petition is a duly attested affidavit. The same is said to have been commissioned by one Henry Muranje. The said Muranje filed an affidavit and denies being involved in the exercise of commissioning. It's clear that it is Mr. Muranje's affidavit which occasioned the Petitioner herein to file the instance application against the 1<sup>st</sup> Respondent primarily.

The said application does not concern the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and indeed their participation was silent.

In his affidavit in support of the application, the petitioner in limb 8 expressly stated that the deponent of the affidavit he heavily relied on was “ **ready and willing to attend court if needed to be personally cross-examined over his affidavit filed herewith separately and independently**”. Indeed it is the same affidavit which the Petitioner relied on and had annexed to his supporting affidavit to the application.

During the pretrial stage of the application, it was agreed upon that after the counsel's submissions, Mr. Muranje was to be summoned to attend court and testify and or be cross-examined by the parties. The matter was adjourned twice for the deponent of the said affidavit to be availed to be cross-examined, but in those two occasions, he failed to turn up. The party who was pushing for his summoning, was the Petitioner. However Mr. Mwinzi on 27/11/2017 expressed his frustration and inability to secure the attendance of Mr. Muranje. He stated that Mr. Muranje had a tight schedule with his other matters and therefore he could not find time to attend the election court.

The 1<sup>st</sup> Respondent argues that the depositions by Mr. Muranje are mere allegations which are yet to be proven. He made reference to Mr. Muranje as a non-party in the matter and lacks locus standi. But clearly, Henry Muranje had sworn an affidavit which he filed herein. The said document threw the spanner in the works in so far as the proceedings herein are concerned. After a successful pre-trial and a hearing date for the hearing of petition proper given, Henry Muranje filed the aforesaid affidavit.

It was stated that he had done a similar affidavit in another case. That he had availed himself in that other matter and testified. He was cross-examined in that other matter. But in the case before me, he did not avail himself to testify and or be cross-examined by especially the 1<sup>st</sup> Respondent.

In the case of **Jacinta Wanjala Mwatela –Vs- I.E.B.C. and 3 others (2013) eKLR**, the High Court of Kenya sitting at Mombasa while dealing with an issue whereby some witnesses had sworn affidavits but failed to attend court for cross-examination stated as follows;

**“ I do agree with counsel for the Petitioner that the court will eventually be at liberty to draw an adverse inference from the failure of these witnesses to avail themselves for cross-examination”**

The learned Judge also proceeded to quote from a persuasive authority i.e. the case of **Wisniewski –Vs- Central Manchester Health Authority 1997 PIQR 324**, where the Court of Appeal in the United Kingdom held as follows:

**“ In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in any action”**

From the averments in the affidavit in support of the application by the Petitioner, it is clear that Mr. Muranje had voluntarily sworn the affidavit he had filed in this matter. It is clear that he had filed the same after his interaction with Mr. Mwinzi. As per the Petitioner, the said advocate had signified his readiness and willingness to attend court and testify.

Rule 5(2) of the Election Petition Rules 2017 states as follows;

**“ A party to a petition or an advocate for the party shall assist an Election Court to further the objective of these rules and from that purpose, to participate in the processes of the Election Court and to comply with the directions and orders of the Election Court”.**

Having filed an affidavit which has raised a critical aspect in this matter, Henry Muranje as the deponent of the said affidavit was under every obligation to attend court for cross-examination.

In Halsbury’s Law of England, 3<sup>rd</sup> Edition, Vol 15, it is stated as follows;

**“ Any party is entitled to cross examine any other party who gives evidence or his witnesses, and no evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination”**

At page 444, paragraph 801 of the same text, it is stated as follows;

**“ Cross-examination is directed to (1) credibility of the witness (2) the facts to which he has deposed in chief, including the cross-examiner’s version thereof, and (3) the facts to which the witness has not deposed but to which the cross-examiner thinks he( witness) is able to depose”**

By his failure to avail himself for cross-examination, Mr. Henry Muranje deprived the parties herein a statutory right vested upon them to cross-examine him. Through cross-examination the veracity of his averments would have been tested.

From the record, I note that the impugned affidavit bears a commissioner for oaths stamp impression. Mr. Muranje in his letter has copied several agencies for their action. The outcome of the said request he put to them is not known yet. There is an allegation of both fraud and forgery. With the bare submissions by Mr. Mwinzi and the failure by the deponent of the affidavit to avail himself for cross-examination, I am unable to make a negative finding Vis-a-Viz the 1<sup>st</sup> Respondent’s affidavit in support of the response to an election petition. It would therefore be my finding that the 1<sup>st</sup> Respondent’s affidavit is properly attested by a commissioner for oaths. The averments in the aforesaid affidavit remain to be unverified claims which I cannot accord enough probative value to warrant striking out the 1<sup>st</sup> Respondents affidavit filed in respect of his response to an Election Petition.

The final issue is whether the court should strike out the 1<sup>st</sup> Respondents affidavit filed here in support of his response to the Election Petition. It is clear that this issue has already been dealt with in the foregoing paragraphs of this ruling. I have already made a finding that the said affidavits are properly attested by a commissioner for oaths. Without belabouring more, I say there would be no basis or justification to strike out the 1<sup>st</sup> Respondent’s affidavit sworn in support of his response to the Election Petition filed herein.

In view of the foregoing, it is my finding that the application dated 13<sup>th</sup> November 2017 is not merited, and accordingly I dismiss the same. Costs in the cause.

**M. ONKOBA-SRM**

***Court***

Ruling read over and delivered in open court in the presence of Mr. Mwinzi for the Petitioner/Applicant, and Mr. Aywa for the 1<sup>st</sup> Respondent and simultaneously holding brief for Mr. Omondi for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent.

Others present Mr. Tony Otolo Court Assistant.

Right of Appeal within 30 days.

**M. ONKOBA-SRM**

***Mr. Mwinzi***

We are most grateful. We are satisfied with the decision. We pray for a date for hearing of the petition.

***Mr. Aywa***

We are equally most grateful. I pray for a copy of the ruling.

***Court***

The ruling to be typed on priority basis. Copy thereof to be furnished to counsel on record upon payment of the requisite fees.

**M. ONKOBA-SRM**

***Court***

By consent of the counsel present in court, the Election Petition shall now be listed for hearing on three consecutive dates i.e. 18<sup>th</sup> December 2017, 19<sup>th</sup> December 2017 and 20<sup>th</sup> December 2017. All counsel and their witnesses to attend court.

**M. ONKOBA-SRM**

**4/12/2017**