



REPUBLIC OF KENYA

SPM'S COURT AT WEBUYE

ELECTION PETITION NO.1 OF 2013

ERIC SOITA PATROBA-----PETITIONER

VERSES

MARTIN WAFULA WAWIRE-----1ST RESPONDENT

IEBC-----2ND RESPONDENT

ODUOL BERNARD ARWINGS-----3RD RESPONDENT

RULING

The 1st respondent's counsel made an oral application that the entire response to the 2nd and 3rd respondents response to the petition filed by the petitioner be expunged from the court record as the rules do not allow for the same to be filed. The rules do not permit filing of response to responses as pleadings closed immediately response was filed. He has no problem with further affidavits. He prayed that the responses filed by the petitioner be expunged from the court record.

The petitioner's counsel opposed the application and submitted that there is nothing cited which expressly disqualifies the petitioner to respond to issues raised in response to the petition. If framers of election rules wanted to say that they could have said that they are not allowed to respond to new matters raised. The court is to discharge justice without looking at technicalities. They want response expunged and this will help narrow down issues. In the interest of justice court should look at if what raised is new then it should give the petitioner leave to respond to the new issues raised. Rule 17(1) gives this court room to dispense all other issues before end of pretrial conference. If the respondents find something offensive in the response they should point it out not expunge the document. He studied the principal register which is voluminous and they have to respond to it and in the forms 35 supplied by the respondents he realized discrepancies which they saw they should bring before court before they finish the pretrial conference. In the interest of justice the respondent cannot bring new evidence and shut them from responding to it as this will be gagging the petitioner from making a response to evidence of respondents. If court finds there is no provision in the Election Act the court should use its discretion to find that the documents on record are dully filed and are proper and if the respondents want to file a response they can do so for justice. We should go by substantive justice.

In reply the 1st respondent's counsel submitted that Rule 17(1) of the Election Rules 2013 the words to be noted are on receipt of the last response to the petition the court shall schedule pre-trial conference, in (a) to (k) of Rule 17 there is no provision to file response to petition what is provided for is for filing of further affidavits under (j), the further affidavits were filed by leave of court. There is no provision to file response. Under rule 14(1) there was strict time lines given 6 months. The rules committee was aware if they allow filing of responses they could have been a delay. The response by the petitioner should be expunged with costs.

I have carefully considered the submissions by both counsels herein and I agree with the 1st respondent's counsel that as per the Election (parliamentary and county Elections)petitions Rules 2013 there is no provision allowing the petitioner to file a response to the respondents response to petition and expunged the said response to response to petition filed by the petitioner but in the interest of justice I grant the petitioner leave to file a further affidavit in support of the petition within 4 days from today and also grant the respondents leave to file their further affidavits in support of their response to the petition within 4 days of being served with the further affidavit in support of the petition. No orders as to costs. Leave to appeal granted to the parties.

DATED and DELIVERED at WEBUYE this 24-day of -May-2013

SN ABUYA

MAGISTRATE

Ruling read in open court in the presence of :Petitioner

Absent-----counsel for the petitioner

Absent-----counsel for the 1st respondent

Absent-----counsel for the 2nd and 3rd respondents