



Odinga & another v Independent Electoral and Boundaries Commission & 8 others (Presidential Election Petition 5 of 2020) [2022] KESC 47 (KLR) (Election Petitions) (29 August 2022) (Ruling)

Neutral citation: [2022] KESC 47 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
ELECTION PETITIONS**

PRESIDENTIAL ELECTION PETITION 5 OF 2020

**MK KOOME, CJ & P, PM MWILU, DCJ & VP, MK IBRAHIM,
SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ**

AUGUST 29, 2022

BETWEEN

RAILA AMOLO ODINGA 1ST PETITIONER

MARTHA WANGARI KARUA 2ND PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

WANYONYI WAFULA CHEBUKATI 2ND RESPONDENT

BOYA MOLU 3RD RESPONDENT

ABDI YAKUB GULIYE 4TH RESPONDENT

JUSTUS NYANG'AYA 5TH RESPONDENT

JULIANA WHONGE CHERERA 6TH RESPONDENT

FRANCIS WANDERI 7TH RESPONDENT

IRENE MASSIT 8TH RESPONDENT

WILLIAM SAMOEI RUTO 9TH RESPONDENT

*(An application to strike out affidavits filed in support
of the petition together with paragraphs of the petition)*



Supreme Court declines to expunge affidavits in support of a presidential election petition at the preliminary stage.

Reported by John Ribia

***Law of Evidence** – admissibility of evidence – admissibility of affidavit evidence – supporting affidavit – claim that a supporting affidavit was inadmissible as it contained hearsay - whether the Supreme Court could expunge supporting affidavits of a presidential election petition at the preliminary stage of the petition on grounds that the affidavits were inadmissible due to hearsay.*

Brief facts

The application by the 9th respondent, William Samoei Ruto, sought to strike out the affidavits of John Mark Githongo, Benson Wesongo and Martin E. Papa which were sworn in support of the petition. The applicant also sought to expunge paragraphs in the petition that sought to summon the Director of Criminal Investigations into the petition. The applicant contended that the affidavits were inadmissible in evidence as they contained hearsay material and that the impugned paragraphs of the petition sought to expand the purview of a petition contrary to the matters which ought to form a petition under article 140 of the Constitution.

Issues

Whether the Supreme Court could expunge supporting affidavits of a presidential election petition at the preliminary stage of the petition on grounds that the affidavits were inadmissible due to hearsay.

Held

1. The affidavits contained factual contestations which had been responded to substantively by the 1st respondent and by the applicant. It was only proper that the court be allowed to consider the totality of the evidence before it and as guided by the rules of evidence be able to discern the probative value and evidentiary threshold of the evidence adduced by each party. Striking out of the affidavits at the instant juncture in isolation while leaving the responses on record was premature.
2. The impugned affidavits could only be dealt with on merits. The court was aware of its circumscribed jurisdiction both under article 140 of the Constitution and as an election court in respect of potential electoral and other offences and therefore it deferred the issue so that it could be dealt with at an appropriate stage.

Application disallowed.

Orders

No order as to costs.

Citations

Cases

None referred to

Statutes

Kenya

1. Constitution of Kenya articles 140, 163(3)(a); 253 - (Interpreted)
2. Independent Electoral and Boundaries Commissions Act, 2011 (Act No 9 of 2011) section 13 - (Interpreted)
3. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) rules 11, 17 - (Interpreted)

Advocates

None mentioned



RULING

1. Upon perusing the notice of motion application brought under certificate of urgency by the 9th respondent / applicant dated August 27, 2022 under provisions of article 253 of the *Constitution of Kenya*, section 13 of the *Independent Electoral and Boundaries Commissions Act* and rule 11 & 17 of the *Supreme Court (Presidential Election Petition) Rules, 2017* seeking orders that:
 - i) The matter herein be certified as urgent and the same be heard expeditiously.
 - ii) This honourable court be pleased to strike out the affidavit in support of the petition sworn by John Mark Githongo on August 21, 2022 and filed on August 22, 2022.
 - iii) This honourable court be pleased to strike out the further affidavit in support of the petition sworn by Benson Wesongo on August 21, 2022 and filed on August 22, 2022.
 - iv) This honourable court be pleased to strike out the affidavit in support of the petition sworn by Martin E Papa on August 20, 2022 and filed on August 22, 2022.
 - v) Paragraphs 64 and 69 together with paragraphs 115 to 127 of the Petition be expunged.
2. Upon perusing the grounds on the face of the application that the affidavits are inadmissible in evidence as they contain hearsay material and that the impugned paragraphs of the petition seek to expand the purview of a petition contrary to the matters which ought to form a petition under article 140 of the *Constitution*; and
3. Upon considering the affidavit dated August 27, 2022 by Josphat Koli Nanok, the Deputy Chief Agent of UDA's Presidential Candidate at the National Tallying Centre, in support of the application who depones that the request to summon the DCI who is a known proxy of the petitioner and who has publicly avowed bias against the 9th respondent is intended to unfairly advance the petitioners' case by introducing extraneous matters which are beyond the purview of a petition under article 140 of the *Constitution*.
4. Taking into account that no responses to the application were filed by the petitioners and the 1st to 8th respondents within the required timelines.
5. Noting the nature of the proceedings before the court being one involving the court's exclusive and original jurisdiction under article 163(3)(a) of the *Constitution* respondent's submissions dated December 27, 2021 and filed on January 5, 2022 through his advocates in which the respondent only addresses the first two issues.
6. We opine that the said affidavits reveal that they contain factual contestations which have been responded to substantively by the 1st respondent and by the applicant including through the affidavits of Martin Wachira Nyaga (on behalf of the 1st respondent) and by Dennis Itumbi who has been directly implicated and Davis Kimutai Chirchir on behalf of the applicant. It is only proper that the court be allowed to consider the totality of the evidence before it and as guided by the rules of evidence be able to discern the probative value and evidentiary threshold of each of the evidence adduced by each party. Striking out of the affidavits at this early juncture in isolation while leaving the responses on record, in our view, is premature under the circumstances.
7. Regarding the request to expunge specific paragraphs of the petition, again we note that it is an issue that can only be dealt with on merits as and when it is made in each of the impugned instances. In



the same vein, the court is aware of its circumscribed jurisdiction both under article 140 and as an election court in respect of potential electoral and other offences and will defer this issue to be dealt with appropriately.

8. From the foregoing, the applicant has not persuaded us to grant the reliefs sought at this moment. In the end, we make the following orders:
- i. The notice of motion application dated and filed on August 27, 2022 be and is hereby disallowed.
 - ii. There shall be no order as to costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF AUGUST 2022.

.....

M. K. KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

.....

P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original.

REGISTRAR

SUPREME COURT OF KENYA

