



REPUBLIC OF KENYA



KENYA LAW
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**Odinga & another v Independent Electoral and Boundaries Commission & 8 others
(Presidential Election Petition E005 of 2022) [2022] KESC 48 (KLR) (29 August 2022) (Ruling)**

Neutral citation: [2022] KESC 48 (KLR)

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

PRESIDENTIAL ELECTION PETITION E005 OF 2022

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

AUGUST 29, 2022

BETWEEN

RAILA 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

JULIANNA WHONGE CHERERA 5TH RESPONDENT

JUSTUS NYANGAYA 6TH RESPONDENT

FRANCIS WANDERI 7TH RESPONDENT

IRENE MASSIT 8TH RESPONDENT

WILLIAM SAMOEI RUTO 9TH RESPONDENT

Filing of further affidavits by applicants in the Presidential Election Petition allowed in response to a petition.

Reported by Kakai Toili

Electoral Law – presidential election petitions – filing of further affidavits in presidential election petitions - where an application was made for the filing of further affidavits by an applicant seeking to respond to serious allegations made by other parties to the suit against them - what were the circumstances where the filing of further or



other affidavits could be allowed in a presidential election petition - Supreme Court (Presidential Election Petition) Rules, 2017, rule 17.

Law of Evidence - affidavits - further affidavits - application to file further affidavits in the presidential election petition - whether one could file further affidavits in the presidential election petition - what were the circumstances where the filing of further or other affidavits could be allowed in a presidential election petition - Supreme Court (Presidential Election Petition) Rules, 2017, rule 17.

Brief facts

The application sought for the court to admit on record the replying affidavits of the 5th to 8th respondents being members of the 1st respondent. The applicants argued that the 2nd, 3rd and 4th respondents in their replying affidavits had alleged that all the members of the 1st respondent attended a meeting with a delegation from the National Security Advisory Committee (NSAC) to subvert the will of the people. It was further contended that the 5th to 8th respondents agreed with the proposal from the NSAC delegation to alter the results of the presidential election in favour of one candidate against another. It was contended that unless the 5th to 8th respondents were allowed to file responses to the allegations, they would suffer great prejudice as the court would make adverse findings without hearing the affected respondents.

Issues

What were the circumstances in which the filing of further or other affidavits could be allowed in a presidential election petition?

Held

1. Under rule 17 of the Supreme Court (Presidential Election Petition) Rules, 2017 there was no provision to allow any further or other affidavits of the instant nature. However, there were special circumstances where facts or allegations were made by the 2nd, 3rd and 4th respondents in their response to the petition. Those events took place during the pendency of the instant matter. It would only be fair and just, considering the serious nature of the allegations and implications of the same, that the 5th, 6th, 7th and 8th respondents ought to be given the opportunity to be heard regarding the same. That was an exceptional circumstance considering all aspects of the matter.

Application allowed with no order as to costs.

Citations

Cases

None referred to

Statutes

Kenya

1. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B) rule 4(2); 17 - (Interpreted)
2. Supreme Court Act, 2011 (cap 9B) section 3A - (Interpreted)

Advocates

None mentioned

RULING

1. Upon perusing the notice of motion application dated August 28, 2022 and filed on even date by the 5th respondent, anchored on rule 17 of the [Supreme Court \(Presidential Election\) Rules, 2017](#) seeking the following orders;



- a) That this honourable court be pleased to admit on record the replying affidavits of Juliana Cherera, Justus Nyangaya, Francis Wanderi and Irene Masit, being members of the 1st respondent, attached hereto.
 - b) That the costs of this application be provided for.
2. Upon considering the grounds on the face of the application, the supporting affidavit sworn on August 28, 2022 by Juliana Cherera and filed on even date. It is the applicants' argument that the 2nd, 3rd and 4th respondents in their replying affidavits have alleged that all the members of IEBC attended a meeting with a delegation from the National Security Advisory Committee (the NSAC) comprising Dr Kennedy Kihara, the Principal Administrative Secretary in the Office of the President, Mr Kennedy Ogeto, the Solicitor General, Mr Hillary Mutyambai, the Inspector General of Police and Lieutenant General Fredrick Ogolla, Vice Chair of the Kenya Defence Forces, to subvert the will of the people. It is further contended that the 5th, 6th, 7th and 8th respondents agreed with the proposal from the NSAC delegation to alter the results of the presidential election in favour of one candidate against another. To contending that unless the 5th, 6th, 7th and 8th respondents are allowed to file responses to the said allegations, they will suffer great prejudice as the court will make adverse findings without hearing the affected respondents. We have also perused the further affidavit sworn on August 28, 2022 and filed on even date by the 5th respondent.

We now opine as follows:

3. We have considered the application and the given justifications for the admission of the further affidavit sworn by the 5th respondent.
4. Under rule 17 of the *Supreme Court (Presidential Election Petition) Rules, 2017* there is no provision to allow any further or other affidavits of this nature. However, we have considered the special circumstances where the facts/allegations made by the 2nd, 3rd and 4th respondents are contained in their response to the petition. These events took place during the pendency of this matter. It would only be fair and just, considering the serious nature of the allegations and implications of the same, that the 5th, 6th, 7th and 8th respondents ought to be given the opportunity to be heard regarding the same.
5. We deem this to be an exceptional circumstance considering all aspects of the matter. We hereby invoke the provisions of the *Supreme Court (Presidential Election Petition) Rules, 2017* rule 4(2) as read together with section 3A of the *Supreme Court Act* (Act No 7 of 2011) on the inherent powers of the court, and allow the further affidavits to be admitted as applied for.
6. Consequently, we make the following orders:
 - a) The notice of motion dated August 28, 2022 be and is hereby allowed.
 - b) There shall be no order as to costs.

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

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M.K. KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

.....
P.M. MWILU M.K. IBRAHIM



DEPUTY CHIEF JUSTICE & JUSTICE OF THE SUPREME COURT VICE PRESIDENT OF THE SUPREME COURT

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S.C. WANJALA NJOKI NDUNGU JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT

.....

I.LENAOLA W. OUKO

JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

