



**Odinga & another v Independent Electoral and Boundaries Commission & 2 others
(Presidential Election Petition 1 of 2017) [2017] KESC 37 (KLR) (27 August 2017) (Ruling)**

*Raila Amolo Odinga & another v Independent Electoral
and Boundaries Commission & 2 others [2017] eKLR*

Neutral citation: [2017] KESC 37 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PRESIDENTIAL ELECTION PETITION 1 OF 2017

**DK MARAGA, CJ & P, PM MWILU, DCJ & VP, MK IBRAHIM,
JB OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ**

AUGUST 27, 2017

BETWEEN

RAILA AMOLO ODINGA 1ST PETITIONER

STEPHEN KALONZO MUSYOKA 2ND PETITIONER

AND

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

**CHAIRPERSON, INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION 2ND RESPONDENT**

H. E. UHURU MUIGAI KENYATTA 3RD RESPONDENT

*(Under article 50 as read with article 25 of the Constitution of Kenya, 2010, section
24 and 31 of the Supreme Court Act, 2011, rule 2, 6, 10, 11, 12 and 17 of the Supreme
Court (Presidential Petition Rules, 2017) and all enabling provisions of law.)*

**Supreme Court dismisses an application seeking to expunge affidavits in support of an application
seeking access to data and information in the 2017 presidential election petition**

Reported by Amazon Chepkirui and Robai Nasike Sivikhe

*Civil Practice and Procedure - affidavits - affidavits in presidential election petitions - timelines for filing
affidavits - whether the affidavits in support of the petitioners' application seeking access to data and
information were filed out of time contrary to rule 10 of the Supreme Court (Presidential Election Petition) Rules
- Supreme Court (Presidential Election Petition) Rules, 2017, rule 10.*



Brief facts

The 1st respondent made an application to expunge various affidavits that had been filed on grounds that the affidavits were filed out of time allowed for filing an election petition contrary to rule 10 of the Supreme Court (Presidential Election Petition) Rules; and that they raised new causes of action and contained additional evidence that changed the nature and character of the petition, to which the 1st respondent was constrained to respond.

Issues

Whether the affidavits in support of the petitioners' application seeking access to data and information were filed out of time contrary to rule 10 of the Supreme Court (Presidential Election Petition) Rules.

Held

1. All the affidavits sought to be expunged from the court record were referred to as "affidavits in support of the petitioners' application" dated August 24, 2017 and filed on August 25, 2017; seeking *inter alia*, direct and unfettered access to data and information. There was no merit in the applicant's claim that the affidavits in question were filed out of time contrary to rule 10 of the Supreme Court (Presidential Election Petition) Rules.
2. Whether the affidavits sought to introduce new evidence and change the character of the petition was a question to be determined by the court while considering the interlocutory application.

Application dismissed.

Citations

Cases

None referred to

Statutes

Kenya

1. Constitution of Kenya, 2010 articles 25, 50 - (Interpreted)
2. Supreme Court (Presidential Election Petition) Rules, 2017 (Act No 7 of 2011 Sub Leg) rule 10 - (Interpreted)
3. Supreme Court (Presidential Election Petition) Rules, 2017 (Act No 7 of 2011 Sub Leg) rules 2, 6, 10, 11, 12, 17 - (Interpreted)
4. Supreme Court Act, 2011 (Act No 7 of 2011) sections 24, 31 - (Interpreted)

Advocates

Mr Amollo Otiende for the petitioners

RULING

1. This is an application by way of notice of motion dated August 26, 2017 by the 1st respondent seeking orders to expunge from the court record the following documents:
 - (a) Affidavit of Dr Edgar Ouko Otumba sworn on August 25, 2017, and filed on the same date;
 - (b) Affidavit of Norman Magaya in support of the petition sworn on August 23, 2017 and filed on August 25, 2017;
 - (c) Omar Yusuf Mohamed sworn on August 24, 2017, and filed on August 25, 2017; and
 - (d) Supplementary affidavit of Ogla Karani sworn on August 25, 2017
2. The application is based on grounds that:



- (i) The affidavits in question were filed out of time allowed for filing an election petition contrary to rule 10 of the *Supreme Court (Presidential Election Petition) Rules*.
 - (ii) The affidavits in question raise new causes of action and contain additional evidence that change the nature and character of the petition, to which the 1st respondent is constrained to respond.
3. In opposition to the application, counsel for the petitioners Mr Amollo Otiende submitted that the same was filed under a misapprehension. According to counsel, the affidavits in question were filed in support of the interlocutory application dated August 24, 2017 by the petitioner. The affidavits were not filed in support of the petition as alleged by the applicant. The applicant has not controverted Mr Otiende’s assertion.
4. We have considered the application, the affidavits in support thereof and submissions by counsel for both parties. We have noted that all the affidavits sought to be expunged from the court record are referred to as “affidavits in support of the petitioners’ application dated August 24, 2017 and filed on August 25, 2017; seeking *inter alia*, direct and unfettered access to data and information.” This being the case, we find no merit in the applicant’s claim that the affidavits in question were filed out of time contrary to rule 10 of the *Supreme Court (Presidential Election Petition) Rules*. The question as to whether the said affidavits seek to introduce new evidence and change the character of the petition is one to be determined by this court while considering the interlocutory application.

Orders:

- (i) The notice of motion dated August 26 is hereby dismissed.
- (ii) Costs to abide the cause.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF AUGUST, 2017.

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D K MARAGA
CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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P M MWILU
DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

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M K IBRAHIM
JUSTICE OF THE SUPREME COURT

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J B OJWANG
JUSTICE OF THE SUPREME COURT

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S C WANJALA
JUSTICE OF THE SUPREME COURT



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N S NDUNGU

JUSTICE OF THE SUPREME COURT

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I LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar

Supreme Court of Kenya

