



REPUBLIC OF KENYA



KENYA LAW
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Odinga & another v Independent Electoral and Boundaries Commission & 2 others (Presidential Election Petition 1 of 2017) [2017] KESC 39 (KLR) (Election Petitions) (27 August 2017) (Ruling)

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

Neutral citation: [2017] KESC 39 (KLR)

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

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 MUGAI KENYATTA 3RD RESPONDENT

(Being an application under Rule 17 of the Supreme Court (Presidential Election Petition) Rules, 2017 and all other enabling provisions of the law)

Application to strike out of the Court record documents in an election petition served out of time dismissed

Reported by Njeri Mweha

***Electoral Law** - presidential election petition - service of election petition documents - delay in effecting service - striking out documents from the record of the court for want of service - considerations that the court would have under the circumstances - Supreme Court (Presidential Election) Rules, 2017, rule 11(1).*



Brief facts

The applicant sought orders to strike out from the court record documents filed by the respondents which were served out of time. The orders were sought on grounds that the documents were served upon the petitioners out of time contrary to the provisions of rule 11(1) of the Supreme Court (Presidential Election) Rules, 2017. The applicant stated that the delay in serving the documents prejudiced the petitioners' right to adequately consider and reply to the issues that the documents raised. The applicant also said that the respondents did not seek leave to file and serve the documents out of time.

Counsel for the 1st and 2nd respondents explained that at the time service was being effected, the office of the petitioners' advocates was closed. Additionally, counsel for the 3rd respondent said that no prejudice was suffered as there was a delay of only a few hours.

Issues

Whether the Supreme Court would strike out documents which were served out of time from the court record.

Held

The nature of the application was such that if it were to be granted, it would dispose of the entire case of the 1st, 2nd and 3rd respondents at a preliminary stage. Such a drastic consequence would not be justified if the scales of justice were weighed in favour of all the parties to the petition.

Application dismissed.

Citations

Cases

Kenya

1. *Odinga, Raila & 5 others v Independent Electoral & Boundaries Commission & 7 others* Petitions 5, 3 & 4 of 2013; [2014] eKLR (Consolidated) - (Mentioned)
2. *Salat, Nicholas Kiptoo Arap Korir v Independent Electoral and Boundaries Commission & 7 others* Application 16 of 2014; [2014] KESC 12 (KLR) - (Mentioned)

Statutes

Kenya

Supreme Court (Presidential Election) Regulations, 2017 (Act No 7 of 2011 Sub Leg) regulation 11(1) - (Interpreted)

Advocates

Mr Awele for the applicant

Mr Nyamodi for the 1st and 2nd respondent

Mr Ngatia for the 3rd respondent

RULING

1. This is an application by way of notice of motion dated August 26, 2017, seeking to strike out and/or expunge from the court record documents filed by the 1st, 2nd and 3rd respondents, which were not served upon counsel for the petitioner. The documents sought to be expunged from the record are:
 - (a) The 3rd respondent's response to the petition dated August 24, 2017;
 - (b) Volume 1 and 2 of the analyses of Winnie Guchu dated August 24, 2017;
 - (c) Volumes 1 and 2 of the affidavit of Mr Davis K Chirchir sworn on August 24, 2017;



- (d) The affidavits of Mr Davis K Chirchir sworn on August 24, 2017 in reply to Mr Godfrey Osotsi's affidavits 1 & 2 and the affidavit of Mr George Kegoro;
 - (e) The affidavit of Winnie Waceke Guchu dated August 24, 2017 in reply to the affidavits of the 1st petitioner, Dr, Nyangasi Oduwo and Olga Karani;
 - (f) The affidavits of Mary Karen Sorobit dated August 24, 2017 in response to the affidavits of Mohamed Noor Barre, Moses Wamuru;
 - (g) Benson Wasonga and Ibrahim Muhamud Ibrahim;
 - (h) The affidavit of He Uhuru Muigai Kenyatta dated August 24, 2017;
 - (i) The affidavits of Brian Gichana Omwenga dated August 24, 2017; in reply to the affidavits of Koitamett Ole Kina and Aprielle Oicho
 - (j) The affidavit of Dr Karanja Kibicho dated August 24, 2017;
 - (k) The affidavit of Andrew Wakahiu dated August 24, 2017;
 - (l) Volumes 1 and 2 of the report of the list of stations where the number of registered voters matches the number of rejected votes by Winnie Guchu Waceke dated August 24, 2017;
 - (m) Volumes 1, 2 and 3 of the analysis of the alleged numerical discrepancies in the affidavit of Dr Nyangasi Oduwo dated August 24, 2017;
 - (n) The affidavit of Brian Gichana Omwenga dated August 24, 2017;
 - (o) A volume '2' of the analysis of form 34B;
 - (p) A list of documents for service;
 - (q) A consolidated analysis of alleged numerical discrepancies in the affidavit of Dr Nyangasi Oduwo;
 - (r) Volumes 1 and 2 of the 1st and 2nd respondent's responses to the petition;
 - (s) The Kenya Gazette Special Issue Vol CXIX-No 86;
 - (t) Exhibit WWC-4(c);
 - (u) Volumes 1, 2 and 3 of IEBC Forms 34B.
2. The ground upon which the application is based is that; the documents in question were served out of time contrary to regulation 11(1) of the *Supreme Court (Presidential Election) Regulations* which provides that:
- " Upon service of a petition under rule 10, a respondent who wishes to oppose the petition may within four days of service of the petition file and serve a response which shall..."
3. It is the applicant's argument that time is of the essence in a presidential election petition and that the delay in serving the said affidavits, annexures and responses prejudiced the petitioners' right to adequately consider and reply to the issues raised. To support his argument, the applicant relies upon this court's judgment in *Raila Odinga & 5 others v Independent Electoral & Boundaries Commission & 7 others*, Election Petition No 5 of 2013.



4. Mr Awele, counsel for the applicant submitted that, in addition, the respondents have failed to seek leave to file and serve the impugned responses and affidavit out of time.
5. In response to the submission that the petitioner's advocate's office was closed, counsel submitted that the respondent ought to have made prior arrangements to ensure that the office remained open. The applicant urges the court to allow this application.
6. Mr Nyamodi, counsel for the 1st and 2nd respondent relied upon the sworn affidavit of Moses Kipkogei a legal officer with the 1st respondent who stated that; he accompanied the process server to the offices of Murumba and Awele Advocates and on arrival at approximately 11.45pm they found the office closed. Consequently, service was effected the next day. He submitted that the petitioners' advocate ought to have availed himself for purposes of accepting service on the night of August 24, 2017 in the same way the court had gone out of its way to indulge all the parties as they filed their documents. In addition, counsel for the 1st respondent also went out of his way to accept service at night when the petition was filed. Counsel submitted that the *Raila* case, was not applicable to the facts that gave rise to the present application.
7. Mr Nyamodi urged the court to find that the delay of service was beyond his fault and dismiss the application.
8. Mr Ngatia counsel for the 3rd respondent submitted that no prejudice was suffered by the petitioners as the delay was only a few hours.
9. He urged the court to consider the peculiar circumstances around this case and excuse the delay in serving. He relies upon this court's ruling in the case of *Raila Odinga & 5 others v Independent Electoral & Boundaries Commission & 7 others*, Election Petition No 5 of 2013 and the reasoning in *Nicholas Kiptoo Arap Korir Salat v Independent Ectoral and Boundaries Commission & 7 others*, [2014] eKLR.
10. We have considered the application, the affidavit in support thereof, and submissions of counsel. The nature of this application is such that were it to be granted, it would dispose of the entire case of the 1st, 2nd and 3rd respondents at this preliminary stage. Such a drastic consequence in our view cannot be justified if the scales of justice are weighed in favour of all the parties to this petition. For the same reasons we have dismissed applications dated August 25, 2017 by the 3rd respondent and August 26, 2017 by the 1st respondent this particular application must suffer a similar fate.

Orders:

- (i) The notice of motion dated August 26, 2017, 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

.....

J. B. OJWANG
JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....

N. S. NDUNGU
JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

