



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mue & another v Chairperson of Independent Electoral and  
Boundaries Commission & 3 others (Election Petition 4 of 2017)  
[2017] KESC 30 (KLR) (Election Petitions) (14 November 2017) (Ruling)**

*Njonjo Mue & another v Chairperson of Independent Electoral  
and Boundaries Commission & 3 others [2017] eKLR*

Neutral citation: [2017] KESC 30 (KLR)

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

**ELECTION PETITION 4 OF 2017**

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

**NOVEMBER 14, 2017**

**BETWEEN**

**NJONJO MUE ..... 1<sup>ST</sup> PETITIONER**

**KHELEF KHALIFA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**THE CHAIRPERSON OF INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

**H E UHURU MUIGAI KENYATTA ..... 3<sup>RD</sup> RESPONDENT**

**NATIONAL SUPER ALLIANCE COALITION (NASA) ..... 4<sup>TH</sup> RESPONDENT**

*(Being an Application by the 3rd Respondent to strike out certain pleadings  
filed by the Petitioners pursuant to Rules 4(1)(c), 6, 9 and 17 of the Supreme  
Court (Presidential Election Petition) Rules, 2017 and Articles 50(1) of  
the Constitution of Kenya and all other enabling provisions of the law)*

**Discretion of the Supreme Court to strike out affidavits and annexures filed out of time in a  
presidential election petition**

Reported by Ribia John



**Election Law** – presidential election petition – timelines for filing presidential election petition - where affidavits and annexures to the presidential election petition were filed out of time - whether the court could strike out affidavits and annexures filed out of time in a presidential election petition.

**Civil Practice and Procedure** – affidavits – striking out paragraphs of an affidavit – where paragraphs of an affidavit made reference to a non-existent affidavit - whether the court could expunge paragraphs of an affidavit that made reference to an affidavit that was not before the court.

**Civil Practice and Procedure** – presidential election petition – copies of a presidential election petition – where some of the copies of the presidential election petition lacked various documents - whether the court could admit documents that were filed in the court registry and that were present in some copies of the petition but were not present in other copies of the petition.

### **Brief facts**

The 3<sup>rd</sup> respondent (Uhuru Muigai Kenyatta) filed an application that sought to strike out various documents that were filed out of time by the petitioners. The documents were filed on November 7, 2017, a day later than the deadline for filing a presidential election petition. The application was also based on the ground that the bound copies of the petition lacked crucial documents. Out of the required 8 copies and the additional copies required to be served upon the respondents, only two sets had all the accompanying documents. The application additionally sought to expunge certain paragraphs from affidavits filed by the petitioner on grounds that some of the paragraphs made reference to a non-existent affidavit.

### **Issues**

- i. Whether the Supreme Court could expunge paragraphs of an affidavit that made reference to an affidavit that was not before the court.
- ii. Whether the Supreme Court could strike out affidavits and annexures filed out of time in a presidential election petition.
- iii. Whether the Supreme Court could admit documents that were filed in the court registry and that were present in some copies of the petition but were not present in other copies of the petition.

### **Held**

1. Rule 7 of the Supreme Court (Presidential Election Petition) Rules, 2017 required a petition filed therein to conform to the provisions of the first schedule which provided that a petitioner was to lodge, together with the petition, at least eight (8) copies of the petition and all documents which accompanied it.
2. The petitioner remained under a duty to strictly comply with the law and in the instant case, file all the required documents within time. However, due to the voluminous nature of the materials brought before the court during presidential election petitions, there was a possibility of a mix-up leading to incomplete set of documents, being filed in some instances.
3. As at the end of November 6, 2017, which was the last day for filing the presidential petition, there were two complete set of petitions filed together with all the accompanying documents. Whereas the petition served upon the 3<sup>rd</sup> respondent contained some volumes of documents which were received by the registry on November 7, 2017, the documents were served on the 3<sup>rd</sup> respondent within time and above all, the two sets of the court's copies had all the documents in place.
4. The 3<sup>rd</sup> respondent would suffer no prejudice if the court admitted the contentious documents as properly filed. However, it was expected that parties would strictly adhere to the procedural rules of the court and while the pressures of time imposed on parties to a presidential election petition were well known, parties ought to be diligent and ensure that all documents were filed within time and with the requisite copies for the court and other parties. The court's reluctant acceptance of the explanation of the delay in filing all documents on time in the instant case was guided by that fact but that acceptance should never be used to make late filings a common feature in the Kenyan judicial system not least in the instant court.

*Application partly allowed.*



## **Orders**

- i. Prayers that sought the striking off of various documents from the affidavits sworn by Njonjo Mue and Billy Atundo on November 5, 2017 were disallowed.*
- ii. Prayer that sought the striking off of the reference to an affidavit by James Gondi at paragraph 76 of the affidavit sworn by Njonjo Mue on November 5, 2017 was allowed.*
- iii. The prayer that sought the striking off of paragraphs 74 and 75 and 30, 31 and 61 of the affidavits sworn by Njonjo Mue and Billy Atudo respectively was disallowed.*

## **Citations**

### **Cases**

None referred to

### **Statutes**

#### **Kenya**

1. Constitution of Kenya article 140 -(Interpreted)
2. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) rule 7 - (Interpreted)

### **Advocates**

*Mr Muhoro* for the 1st respondent

## **RULING**

1. This is an application by way of a notice of motion dated November 11, 2017, seeking to strike out and expunge from the record the following documents??
  - (a) Volume 1 being an affidavit by Njonjo Mue sworn on November 5, 2017;
  - (b) Volume 2 being an annexure marked “NM 21” to the affidavit of Njonjo Mue filed on November 7, 2017;
  - (c) Volume 9 being an annexure marked “BA 13” to the affidavit of Billy Atudo;
  - (d) Volume 10A being an annexure marked “NM 21” to the affidavit on Njonjo Mue;
  - (e) Volume 10B being an annexure marked “BA 14” to the affidavit of Njonjo Mue; and
  - (f) Volume 12B being an annexure marked “BA 40” to the affidavit of Billy Atudo.
2. The application also seeks to strike out certain paragraphs of the affidavits filed in support of the petitioners’ case as follows??
  - (a) Part of paragraph 76 and the whole of 74 and 75 of the affidavit sworn by Njonjo Mue on November 5, 2017; and
  - (b) Paragraph 30, 31 and 61 of the affidavit sworn by Billy Atudo on November 5, 2017.
3. In support of the application, the 3<sup>rd</sup> respondent urges that the identified documents were filed out of time and that though the deadline for filing the petition was November 6, 2017, the above documents were filed on November 7, 2017, one day out of time.
4. With regard to paragraphs 74 and 75 of the affidavit sworn by Njonjo Mue and paragraphs 30, 31 and 61 of the affidavit sworn in support of the petition by Billy Atudo, the 3<sup>rd</sup> respondent urges that, once the impugned annexures are struck out, the affected paragraphs will henceforth lack a legal foundation upon which they can stand and must similarly be struck out.



5. With regard to paragraph 76 of the affidavit sworn by Njonjo Mue, the 3<sup>rd</sup> respondent submits that though the said paragraph refers to an affidavit by one, James Gondi, no such affidavit has been annexed to any of the petitioners' documents and therefore any reference to it is superfluous.
6. In his submissions, the 3<sup>rd</sup> respondent therefore urges that the Supreme Court Rules provide that a petition must be supported by an affidavit together with all the accompanying annexures and once they are not filed within time or at all then the whole petition collapses.
7. In opposing the application, the petitioners submit that article 140 of *Constitution* provides for the filing of only a petition as a basic requirement through which one approaches the court in a presidential election petition. They thus urge that, as at the end of November 6, 2017, they had filed a complete petition together with all the accompanying documents as is required under the law. The petitioners' counsel on record, Ms Soweto, further submitted that, though they had in their possession all the required documents as at midnight on November 6, 2017, they were advised at the registry to come back the following morning, to complete the filing exercise. Counsel however later acknowledged that out of the required 8 copies and the additional copies required for the respondents, only two sets had all the accompanying documents and those were the documents that were acknowledged to have been filed on October 6, 2017.
8. With reference to the affidavit of one James Gondi, referred to at paragraph 76 of Njonjo Mue's affidavit, counsel admitted that its non-filing was an inadvertent error and the same is indeed not on record. Consequently, she submitted that she had no objection to the striking off of any reference to such an affidavit.
9. On his part, Mr Muhoro, counsel for the 1<sup>st</sup> respondent opposes the application and submits that there has been a long queue at the Registry over the last one week due to the many volumes of documents being filed and hence it is possible to file some documents out of time. That therefore the late filing of the documents in issue is excusable.
10. Having considered the application, the affidavit in support thereof, and the submissions of counsel for the parties, we have arrived at the following conclusions:
  - (a) Rule 7 of the *Supreme Court (Presidential Election Petition) Rules, 2017* requires a petition filed therein to conform to the provisions of the First Schedule which provides that a petitioner shall lodge, together with the petition, at least eight (8) copies of the petition and all documents which accompany it.
  - (b) Though the petitioner remains under a duty to strictly comply with the law and in this case, file all the required documents within time, we recognize that due to the voluminous nature of the materials brought before the Court, during presidential election petition, there is a possibility of a mix-up leading to incomplete set of documents, being filed in some instances.
  - (c) In this case however, as at the end of November 6, 2017, which was the last day for filing the presidential petition, there were two complete set of petitions filed together with all the accompanying documents.
  - (d) Whereas we acknowledge that the petition served upon the 3<sup>rd</sup> respondent contained some volumes of documents which were received by the registry on November 7, 2017, the said documents were served on the 3<sup>rd</sup> respondent within time and above all, the court appreciates that two sets of the court's copies had all the documents in place.



11. Flowing from the above, we find that the 3<sup>rd</sup> respondent will suffer no prejudice if we admit the contentious documents as properly filed. Having so said however, it would be expected that parties would strictly adhere to the procedural rules of this court and while the pressures of time imposed on parties to a presidential election petition are now well known, parties ought to be diligent and ensure that all documents are filed within time in this case and with the requisite copies for the court and other parties. Our reluctant acceptance of the explanation of the delay in filing all documents on time in this case is guided by that fact but that acceptance should never be used to make late filings a common feature in our judicial system not least in this court. Having so stated, we make the following orders:
- (a) Prayers (a)-(f) with regard to the striking off of various documents from the affidavits sworn by Njonjo Mue and Billy Atudo on November 5, 2017 are hereby disallowed.
  - (b) Prayer seeking the striking off of the reference to an affidavit by James Gondi at paragraph 76 of the affidavit sworn by Njonjo Mue on November 5, 2017 is hereby allowed.
  - (c) As a consequent to order (a) above, the prayer seeking the striking off of paragraphs 74 and 75 and 30, 31 and 61 of the affidavits sworn by Njonjo Mue and Billy Atudo respectively, are hereby disallowed.
  - (d) There shall be no orders as to cost.

**DATED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2017.**

.....

**D. K. MARAGA**

**CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT**

.....

**P. M. MWILU**

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

.....

**J. B. OJWANG**

**JUSTICE OF THE SUPREME COURT**

.....

**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....

**N. S. NDUNG’U**

**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR**

