



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

ELECTION PETITION NO. 2 OF 2017

(CORAM: J.A. MAKAU - J.)

IN THE MATTER OF: THE ELECTION ACT, NO. 24 OF 2011

LAWS OF KENYA AND THE ELECTIONS

(GENERAL) REGULATIONS, 2012

AND

IN THE MATTER OF: ELECTIONS (PARLIAMENTARY

AND COUNTY) PETITION RULES 2017

AND

IN THE MATTER OF: THE ELECTION FOR MEMBER OF NATIONAL ASSEMBLY,

WEST MUGIRANGO CONSTITUENCY, HELD ON 8TH AUGUST 2017

BETWEEN

STEPHEN M. MOGAKA.....PETITIONER

VERSUS

1. INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION (IEBC).....1ST RESPONDENT

2. VINCENT KEMOSI MOGAKA.....2ND RESPONDENT

3. MUGIRANGO CONSTITUENCY.....3RD RESPONDENT

R U L I N G

1. This Election Petition was filed on 6th September 2017 by the Petitioner seeking several prayers. The petition was served on the 1st Respondent on 8th September 2017 who acknowledged receipt by

stamping on the principal copy, whereas on the 10th September 2017, the Petitioner paid for an advertisement of the Election Petition on 10th September 2017, in the Daily Nation.

2. The 1st Respondent and the 3rd Respondent filed their responses on 26th September 2017 and on 22nd September 2017 respectively. The delay in filing the responses within time provided by the law provoked the Petitioner and the Respondents to file myriads of applications and preliminary objections seeking various orders. The various applications are dated, 6th September 2017, 18th September 2017, 2nd October 2017, 5th October 2017, 4th October 2017 and two preliminary objections dated 6th October 2017 and 9th October 2017 following which the Court directed all the applications and objections be heard together. I propose therefore to deal with each application on its own as I go through all the applications and the Notices of the Preliminary objections.

A. APPLICATION DATED 18TH SEPTEMBER 2017

3. The 2nd Respondent through an application dated 18th September 2017 pursuant to **Rule 9 of the Advocates (Practice) Rules 1966** seeks the following orders: -

(i) That this Honourable Court do order that ELIKANA MOKUA NDUBI, one of the Advocates appearing for the Petitioner in this matter, cease to appear or continue to appear for the Petitioner.

(ii) That ELIKANA MOKUA NDUBI, Advocate be restrained by an injunction from representing the Petitioner in this petition.

(iii) That the costs of this application be provided for.

The application is premised on the grounds on the face of the application *inter alia*:-

(i) Mr. Elikana Mokua Ndubi was interviewed for a position of Deputy Presiding Officer by the 1st Respondent, was subsequently recruited as such Deputy Presiding Officer for the elections held on 8th August 2017.

(ii) That Mr. Elkana Mokua Ndubi, signed oath of secrecy with the 1st respondent, was then trained on all electoral processes and ultimately deployed at Gesore PAG Primary School polling station stream 1, West Mugirango Constituency, as Deputy Presiding Officer to oversee the elections on 8th August 2017.

(iii) That by virtue of the said recruitment and training, Mr. Elikana Mokua Ndubi may have come across, even if such access was unintentional, confidential and privileged information that was once in the custody of the 1st and 3rd Respondents which information has a bearing on this petition.

(iv) That by virtue of participating as Deputy Presiding Officer as aforesaid, Mr. Elkana Mokua Ndubi had intricate and confidential information regarding this Election Petition.

(v) That Mr. Elkana Mokua Ndubi has in fact heavily quoted the polling station where he was Deputy Presiding Officer, in building up the Petitioner's case in this petition.

(vi) That the position taken by Mr. Elkana Mokua Ndubi is clearly adverse to the position to be taken by the Respondents.

(vii) That the 2nd Respondent stands to suffer extreme prejudice in the circumstances and in light of their apparent potential conflict of interest.

(viii) That, it is extremely crucial that Mr. Elkana Mokua Ndubi be compelled to step aside.

The application is further supported by an affidavit of Hon. Vincent Kemosi Mogaka dated 18th September 2017 and annexures thereto.

4. Mr. Elkana Mokua Ndubi, Learned Advocate, who is sought to cease appearing for the Petitioner or cease to appear or continue to appear for the petition opposed the application and filed replying Affidavit dated 28th September 2017 and 9th October 2017 controverting the issues raised in the applicant's application dated 18th September 2017.

5. At the hearing, Mr. Osoro Mogikoyo, Learned Advocate, sought prayers nos; 1, 2, 3 and 4 of the application be granted and relied mainly on the grounds on the face of application, affidavit thereto and annexures. The Applicant's main contention is that E.M. Ndubi, Learned Advocate, for the Petitioner was a Deputy Presiding Officer in one of the polling stations mentioned in the application, that he participated actively in the process of the election and by virtue of that factor he acquired confidential information which he may use to the prejudice of the Petitioner. That he did not deny having participated in the election of the 8th August 2017, as alleged, urging that the Respondent is an Advocate of the High Court of Kenya, who filed the petition and heavily quoted the polling station in which he was Deputy Presiding Officer, in building up the Petitioner's case in the petition. He urged that in Form 35A, the Respondent did not sign the same but only the Presiding Officer of Gesore PAG Primary School polling station and no reasons for not signing were made (form marked **VKM3**). The Applicant urges further the Respondent herein Mr. E. M. Ndubi having been recruited, trained and participated in the 8th August 2017 elections as a Deputy Presiding Officer of Gesore PAG Primary School polling station Stream No. 1, he holds intricate and confidential information, that might have come into his hands by such interaction with the 1st and the 2nd Respondents in this petition. It is further urged that Mr. E. M. Ndubi has a potential conflict of interest in this matter, that he will use the confidential information he acquired from his conduct of the Election on 8th August 2017 as a deputy Presiding Officer for the benefit of the Petitioner to the prejudice of the 2nd Respondent in this petition by virtue of Gesore PAG Primary School polling station having been mentioned several times in this Petitioner's Election petition. The Applicant further depones he is not critiquing the bonafides of Mr. E. N. Ndubi, Advocate for choosing to act for the Petitioner as an Advocate, rather he is raising a serious weighty and important issue relating to his rights.

6. Mr. E.M. Ndubi, Advocate in his response opposed the application and relied on the replying affidavits dated 28th September 2017 and 9th October 2017, urging he has not been accused by anyone of not maintaining the secrecy of the ballot, nor communicating except for a purpose authorized by law before the polling station was closed in respect to West Mugirango Constituency and that he did anything, that compromises the secrecy of the vote. He urged the allegation made to the effect that he did not sign Form 35A as annexed and marked **NEMI** (a copy of Form 35A), by the 2nd Respondent to be fake as he did sign the relevant Form 35A. He urges he is one of the Petitioner's Advocates and that the petitioner has constitutional right to choose any Advocate, he wishes to represent him in this petition. He urged that he was not in charge of Gesore PAG Primary School Polling Station No. 2 and he cannot be blamed for any irregularities and/or malpractices that might have occurred there (if any); urging further his role as Deputy Presiding Officer was to ensure the ballot papers were deposited in the correct ballot boxes, signing Form A Series, as Presiding Officer did and party agents and filling Form 33. He further stated he was not in charge of the KIEMS Kits, Form 32A and 32, which are the bone of contention in the petition filed by the Petitioner. He avers that he does not hold any intricate and confidential information

that came into his hands by his interaction with the 1st and the 2nd Respondents as alleged. He urged that there is nothing secretive or confidential about the test and/simulation of deployment of KIEMS Kits, as public were sensitized on their operation. The Respondent in this application denies having any of the 1st Respondent's confidential information nor having any conflict of interest whatsoever in this petition. He denied having been engaged by the 1st and/or the 3rd Respondents to represent them in any matter and urged there has been no advocate-client relationship between himself and the 1st and the 3rd Respondents in this petition, pointing out that he is not a witness in this petition. He submitted if there were irregularities in Gesore Station No. 1, he and the Presiding Officer should be the ones to be held responsible.

7. The 1st and the 3rd Respondent's Counsel supported the 2nd Respondent's application and in doing so relied on an affidavit dated 5th October 2017. He reiterated the submissions by the counsel for the 2nd Respondent and stated as long as Mr. E. M. Ndubi, Advocate admitted he signed Form 35A, he then becomes a witness.

8. I have very carefully considered the pleadings, respective affidavits, rival submissions and authorities by respective advocates. From the above, the issue for determination is, whether the Applicant has sufficiently demonstrated that the application warrants to be granted.

9. Under **Rule 9 of the Advocates (Practice Rules)**, it is clear that no Advocate may appear in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit and while appearing in any matter; it becomes apparent that he will be required as a witness to give evidence, whether verbally or by a declaration or affidavit, he should not continue to appear.

10. In **Uhuru Highway Development Ltd Vs Central Bank of Kenya & 2 Others [2002]EA 655**, the Court held as follows: -

"We are satisfied that the real mischief or real prejudice were not rightly anticipated. The Learned Judge failed to appreciate that possible much more confidential information was imparted to the counsel than envisaged. We have no doubt whatsoever in our minds that in the particular circumstances of this case, mainly due to the role played by the counsel in bringing about the first and second Plaintiffs to agree to sign the charge, he may consciously or unconsciously or even inadvertently use the confidential information acquired during the preparation of the charge. There will be no doubt be prejudice."

11. In **Murigu Wanyoike Vs Dyno Holdings Limited E&L 279 of 2013**, Hon. Justice Munyao quoted with approval from **Delphis bank Ltd Vs Channah Singh Chattle & Others[2005]eKLR** as follows: -

"The Court of Appeal held that there is not general rule that an Advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. It held that the test which has been laid down is whether real mischief or real prejudice will in all human probability result. It further held that each case must turn on its own facts to establish whether real mischief and real prejudice will result. In this case, the court did not think that ample evidence had been tabled that the appearance of Mr. Menezes in the matter would at all be prejudicial to any party and dismissed the objection."

12. This is an Election Case and each case must be treated on the law applicable and its facts. It is therefore, the duty of the court faced with an application, of this nature, to determine whether the facts of a particular case, would be prejudicial for a particular Advocate to appear in this matter. The issue as

specifically stated in **Rule 9 of the Advocates (Practice) Rules**, is whether the Advocate may be called as a witnesses. It is not whether the Advocate shall be called as a witness. It is enough if demonstrated there is likelihood of the Advocate being called as witness exists and that the likelihood continue to exist till the suit is heard and determined.

13. In the instant case, the Petition was filed on 6th September 2017 and witnesses statements filed on the same date. The 2nd Respondent, the 1st and the 3rd Respondent filed their responses on 22nd September 2017 and 26th September 2017 respectively with their list of their witnesses, amongst whom, Mr. E. M. Ndubi, Advocate is not a witness. By virtue of **Rule 12(3)&(4) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**, it is provided: -

“12. (3) Each person who the petitioner intends to call as a witness at the hearing, shall swear an affidavit.

(4) A petitioner shall, at the time of filing the petition, file the affidavits sworn under subrule (3).”

Similarly, it is provided under **Rule 12(5)(6)(7)(8) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** as follows: -

“12(5) A response to the petition under Rule 11 shall be supported by an affidavit sworn by the Respondent.

(6) Each person who the Respondent intends to call as a witness at the hearing, shall swear an affidavit.

(7) A Respondent shall, at the time of filing the response to a petition, file the affidavits sworn under Sun-Rule (6).

(8) Except with the leave of Election Court and for sufficient cause, a witness shall not give evidence unless an affidavit sworn by the witness is filed as required under these Rules.”

14. The Petitioner and the Respondents filed at the time of filing the petition and response affidavits by the people they intend to call as witnesses at the hearing. Mr. E.M. Ndubi, Advocate, is not one of the witnesses in the list filed by the respective parties. None of the parties has indicted by way of an application he is a potential witnesses and no application has been filed seeking leave of court and no sufficient reason has been advanced for Mr. E. M. Ndubi to give evidence. I therefore, find and hold there is no likelihood of the Advocate herein being called as a witness nor would such likelihood continue to exist in view of the statutory provisions as regards persons to be witnesses in Election Petitions.

15. The Applicant’s application is based on the suspicion and fear that Mr. E. M. Ndubi, Advocate might have come across, even if such access was unintentional with confidential and privileged information that was once in custody of the 1st and the 3rd Respondents and further on allegation that Mr. E. M. Ndubi may have intricate and confidential information regarding the petition, which may be prejudicial to the 2nd Respondent’s case. I note that the Applicant made no attempt to disclose or indicate the intricate and confidential information regarding the petition, that Mr. E. M. Ndubi, Advocate has and which he may use to the detriment of the 2nd Respondent’s case. Mr. E.M. Ndubi, Advocate denied being armed with any detrimental information or arsenals against the 2nd Respondent or having committed any irregularities as a Deputy Presiding Officer at Gesore PAG Primary School Polling Station No. 1 or any other which he may use to the detriment of the 2nd Respondent. The contents of the affidavit of Mr. E. M. Ndubi, Advocate have not been controverted by any further or supplementary affidavit. Indeed Mr. E. M.

Ndubi, Advocate, stated that Form 35A, which he is alleged not to have signed, to be fake and categorically deponed, he signed Form 35A and at his polling station there were no irregularities. I find the Petitioner's suspicion, cannot be sufficient reason to deny the petitioner services of a counsel of his own choice.

16. The issue of representation of a party by a counsel of his own choice has been raised by the 2nd Respondent, and the Respondent Advocate, who referred the Court to: **Article 50(2)(g) of the Constitution of Kenya, 2010** which provides: -

"50. (2) Every accused person has the right to a fair trial, which includes the right—

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;"

17. **Who is an accused person**" In the **Black's Law Dictionary, Ninth Edition, Page 25**, "*an accused*" is defined as follows: -

"1. A person who has been blamed for wrongdoing; esp., a person who has been arrested and brought before a magistrate or who has been formally charged with a crime (as by indictment or information).

2. A person against whom legal proceedings have been initiated"

In this regard, an accused person may include any person implicated in a wrong doing or violating others rights and it may be used interchangeably in both civil and criminal cases. It may refer to a defendant or the Respondent. I therefore in this case, find the Petitioner or the Respondent may be referred to as an accused at certain different stages of the proceedings. The same may be applicable to the Respondent. I therefore find as per our New Constitution, the Respondent is entitled to be represented in this petition by a counsel of his choice, failure whereof his constitutional rights to a fair hearing would be violated or infringed.

18. In **Mr. William Avidi Odede & Another Vs John Yien & Another, C.A. Civil Application NAI 360 of 2004 (KSM) 33/04**, the Court held: -

"It is not the business of the Courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel"

19. The Petitioner herein has a Constitutional right to engage services of an Advocate of his /or own choice and can only be denied such a choice if it is shown or sufficiently demonstrated that by engaging such an Advocate, justice shall not be seen to be done or shall not be done or the interest of justice would not be served.

20. Having said that much, I find that the 2nd Respondent's application dated 18th Septembers 2017 to be unmerited and I proceed to dismiss the same.

Costs shall in the Cause.

HON. J. A. MAKAU,

JUDGE

B. APPLICATION DATED 6TH SEPTEMBER 2017

21. The Petitioner through an application dated 6th September 2017 filed pursuant to **Article 35(1)(a) and (b) of the Constitution of Kenya, 2010, Section 4(1) of the Access to Information Act, Section 27 of the Independent Electoral and Boundaries Commission Act, Section 80 (4)(a) and 82 of the Elections Act and Rules 28 and 29 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, Rule 3(1) and 3(2) of the High Court (Practice and Procedure) Rules of the Judicature**; seeks the orders on the face of the application *inter alia*: -

(a) That pending the hearing and determination of this Application, the Court be pleased to make an order for the preservation and safe keeping of all the Kenya Integrated Election Management Systems (KIEMS) Kits used in all the 147 polling stations and tallying centres with respect to the election of member of National Assembly, West Mugirango Constituency held on 8th August 2017.

(b) That the 1st and the 3rd Respondents to allow the Petitioner/Applicant to fix his own seals on the ballot boxes used for the election of member of National Assembly West Mugirango Constituency and the Petitioner / Applicant to place his own locking gadgets to the rooms or premises where election materials for the election of Member of National Assembly West Mugirango constituency are kept. The seals and locking gadgets to be placed/fixd by the Petitioner/Applicant will be in addition to those already placed/fixd by the 1st and 3rd Respondents.

(c) That the 1st and the 3rd Respondents be compelled to immediately and unconditionally supply the following to the Petitioner: -

i. The logs for 147 KIEMS Kit used in the 8th August 2017 West Mugirango Parliamentary election;

ii. Total number of voter registered per polling station in West Mugirango Constituency.

iii. Total number of voters who voted per polling station in West Mugirango Constituency;

iv. Total votes cast per polling station in West Mugirango Constituency;

v. Number of voters who had been identified biometrically and by supervisor mode per polling station in West Mugirango Constituency.

vi. Copies of all the Polling Stations Diaries used in West Mugirango Constituency

(d) That the 147 KIEMS Kits used in the 8th August 2017, West Mugirango Parliamentary election be produced in Court for purpose of scrutinizing and verifying the information contained herein.

(e) That the scrutiny and verification be conducted in the presence of the Deputy Registrar, parties to this petition and a report to be prepared by the Deputy registrar, supplied to the parties to this petition and the court.

(f) Copies of this application and interest thereon be provided for.

(g) Any other and further relief that this Honourable Court may deem fit and just to grant.

22. The Application is based on general grounds on the face of the application and affidavit of support by Stephen M. Mogaka dated 6th September 2017 and all annexures thereto.

23. The 1st and the 3rd Respondent opposed the applicant through a Replying Affidavit dated 12th September 2017 and grounds of opposition, whereas the 2nd Respondent filed grounds of objection dated 12th September 2017.

24. Mr. Omari, Learned Advocate, for the Applicant/Petitioner relied on the contents of the supporting affidavit and urged the prayers sought for preservation and safe keeping of (KIEMS) Kits used in all the 147 Polling Stations and Tallying centres with respect to members of National Assembly, West Mugirango Constituency, held on 8th August 2017 had been preserved in an order made in the Nyamira Governors Petition No. 1 of 2017. He went on to state that they were therefore now seeking printed version or the logs for the 147 KIEMS Kits used on the 8th August 2017, West Mugirango Constituency. He urged the Petitioner under **Article 10 and 35 of the Constitution of Kenya, 2010 and Section 4(1) of the Access to the Information Act**, is entitled to the information sought. He relied on the list of filed authorities.

25. Mr. Maloba, Learned Advocate, for the 1st and the 3rd Respondents in opposition to the application, urged a party is bound by his pleadings and urged in the instant application, the Applicant is seeking scrutiny and that he is on a fishing expedition. He urged the Applicant has failed to lay basis for orders of scrutiny. He urged the petitioner is using back door to prove his case.

26. Mr. Mogikoyo, Learned Advocate, for the 2nd Respondent associated himself with the submissions made by the Counsel for the 1st and the 3rd Respondents. He urged grounds nos. 1, 2, 3 and 4 are spent. Mr. Mogikoyo, Advocate in opposing the application relied entirely on ground no. 3 of the 2nd Respondent's ground of opposition, thus, the prayers sought in the application are not anchored on prayers sought in the said Election Petition, as there are no prayers for scrutiny and recount of the ballots cast during the time of election in dispute. He urged further that the Court cannot grant what has not been prayed for in the pleadings.

27. Mr. Omari, Learned Counsel in a quick rejoinder urged the Respondents had not understood the Petitioner's case, urging the Petitioner has sought recount of the ballots but not scrutiny and that he has sought print out of the logs as the SD cards are before Court, urging the prayer are in the main petition on *Page 13, paragraph 2.6.5 and paragraphs 47-50* of the petition and Petitioner's affidavit filed on 6th September 2017. He urged what the Petitioner is seeking can be granted *suo moto* pursuant to **Rule 15(1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**.

28. I have carefully considered the application, grounds in support, the replying affidavit, grounds of objection and opposition, as well as the submissions of the counsel and authorities relied on by the parties to buttress their respective rival positions. The issue for consideration is whether the orders sought are amenable to the Petitioner / Applicant.

26. The Applicant/ Petitioner in support of the prayers for preservation of and safe keeping of all (KIEMS) Kits urged that as the same has been preserved in Nyamira Governor's Petition No. 1 of 2017, that they do not intend to pursue that prayer, but are now seeking an order for recount of the ballots and not scrutiny. The Petitioner specifically under prayer number 5 and 6 states as follows: -

"5. That the 147 KIEMS Kits used in the 8th August 2017 West Mugirango Parliamentary Election be produced in Court for the purposes for scrutinizing and verifying the information contained therein."

“6. That the scrutiny and verification be conducted in the presence of Deputy Registrar, parties to this Petition and a report to be prepared by the Deputy Registrar, supplied to the Parties to this petition and the Court.”

30. From the submissions by the Petitioner’s Counsel and the nature of the application the Petitioner under prayers nos 5 and 6 is seeking scrutiny and verification of the information contained in the KIEMS Kits.

31. In the Petitioner’s petition filed 6th September 2017, there is no prayer for a recount or scrutiny under *paragraph 2.6.5 on page 13* of the Petition, as stated, that at the pre-trial conference the Petitioner would seek particulars as set out under the same *paragraph* but contrary to what the Petitioner’s counsel urged, there is no mention, that a recount shall be sought. The request for information as set out under the aforesaid paragraph is quite different and distinct from seeking a recount and/or scrutiny. The two limbs cannot be confused at all. Similarly, under *paragraph 47, 48, 49 and 50* of the affidavit on the main petition dated 6th September 2017 at *page 37-38*, there is no request for a recount or scrutiny.

32. In **Raila Amolo Odinga and Stephen Musyoka Vs IEBC & Others, Presidential Petition No. 1 of 2017**. In the majority decision under *paragraph 62*, it was held: -

“Having addressed our minds to the above issues, it is our view that first, we note that as correctly argued by Counsel for the 3rd respondent, a party must be bound by its pleadings and secondly, any scrutiny of either the Forms or the technology must be made for a sufficient reason. Any prayer in the application that would seem to be an expansion of the case for the petitioners or which would in effect be a fishing exercise to procure fresh evidence not already contained in the petition would and must be rejected.”

33. Similarly, in **Ramadhan Seif Kajembe Vs Returning Officer, Jomvu Constituency & 3 Others [2013]eKLR**, it was held the burden of proof lies on the Petitioner once he files the petition making allegations to prove the same as the burden do not shift to the commission to show the elections were indeed conducted in accordance with the law. In view of this, the burden lies on the Petitioner to demonstrate and prove the prayers for recount and scrutiny is part of the pleadings by pointing them out to the Court.

34. Under **Rule 8(3)(a)-(e)** of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017**, states as follows: -

“(3) The Petition shall conclude with a statement setting out the particulars of the relief sought which may include: -

- a) A declaration on whether or not the candidate whose election is questioned was validly elected.***
- b) A declaration of which candidate was validly elected.***
- c) An order as to whether a fresh election should be held;***
- d) Scrutiny and recounting of the ballots cast at election in dispute;***
- e) Payment of costs.***

(Underlining is mine to emphasis recount and scrutiny)

The above Rule is couched in a mandatory form, hence it is mandatory for the Petitioner in an application seeking for recount or tallying or scrutiny to have prayed for the same in the petition for scrutiny and/or recounting of the ballots cast at the election in dispute for the application to succeed. In my view, in absence of a prayer for scrutiny and/or recount, seeking such orders in an application will be an exercise in futility for the purpose of scrutinizing the information contained in the 147 KIEMS Kits used on 8th August 2017. The Petitioner in his petition failed to plead for scrutiny and/or recount. He is trying through this application to introduce new evidence and change the very nature of his petition after the period prescribed for filing election petition has lapsed. Such application will not add value to the petition, will serve no useful purpose but would be a waste of court's value time and delay determination of the petition within the timeliness. This is a court of law and court cannot grant a party which has not been pleaded and/or sought in a petition, neither can an application filed after timelines granted by the Constitution be extended. **Article 87(2) of the Constitution** provides as follows:-

“Petition concerning an election other than a Presidential Election shall be filed within 28 days after the declaration of the election result by the Independent Electoral and Boundaries Commission.”

35. In view of the above, I find that **Election disputes Resolution** timeliness prescribed under the **Constitution and the Election Act No. 24 of 2011**, and more so, those related to filing petition and service, thereto are not extensible. That the time for filing a petition having since lapsed after 28 days from the declaration of the election results, the Petitioner cannot now be allowed to change the nature of his petition by purporting to seek prayers which were not initially pleaded for, otherwise, I find the Petitioner's application is seeking to introduce new prayers to be a fishing expedition or introducing new matters or amending the petition through the back door to be untenable.

36. Having come to the conclusion I have, I make the following orders: -

(a) The Applicant / Petitioner application for preservation and safe keeping of storage disk cards used in all 147 polling and tallying centres with respect to election on 8th August 2017 for Member of National Assembly, West Mugirango Constituency is granted.

(b) The Petitioner/Applicant and the 2nd Respondent are allowed to fix their own seals to the ballot boxes in addition to that of the IEBC and put their own padlocks to the premises where the election materials for the election of Member of National Assembly West Mugirango are kept under supervision of the Deputy Registrar within two days from today.

(c) The Petitioner / Applicant is granted access to information stored in the KIEMS Kits. The IEBC to present printouts and/or SD cards to the Deputy Registrar of this Court before case proceeds to full hearing within two days.

(d) Prayer for recount and scrutiny is devoid of merits and is dismissed.

(e) Costs shall be in the Cause.

HON. J. A. MAKAU

JUDGE

C (I) PRELIMINARY OBJECTION DATED 6TH OCTOBER 2017 BY THE PETITIONER.

(II) PRELIMINARY OBJECTION DATED 9TH OCTOBER 2017 BY THE PETITIONER.

(III) APPLICATION DATED 2ND OCTOBER 2017 BY THE PETITIONER.

(IV) APPLICATION DATED 4TH OCTOBER 2017 BY THE 1ST AND THE 3RD RESPONDENT.

(V) APPLICATION DATED 5TH OCTOBER 2017 BY THE 2ND RESPONDENT.

37. The two Preliminary objections and the three applications were all heard together, and I proposed to deal first, with the two preliminary objectives before I deal with the three applications. **The notice of preliminary objection dated 6th October 2017 by the Petitioner avers that this court lacks jurisdiction to entertain Notice of Motion dated 5th October 2017.** The said Notice of 5th October filed by the 2nd Respondent is brought pursuant to **Rule 5(1) and 19(1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 and Article 159(2)(d) of the Constitution of Kenya 2010.** The 2nd Respondent seek the following orders: -

(i) Extension of time within which to file the response.

(ii) The 2nd Respondent's response to the Petition filed in Court on 22nd September 2017 be deemed as properly filed and served upon the grant of time.

38. On the other hand, the **Notice of Preliminary objection dated 9th October 2017 by the Petitioner avers that this Honourable Court lacks jurisdiction to entertain the Notice of Motion dated 4th October 2017,** which is brought pursuant to provisions of **Article 159(2) (d) of the Constitution of Kenya 2010; Section 80(1)(d) of the Elections Act No. 24 of 2011; Rule 19(1) of the Elections (Parliamentary and County elections) Petitions Rules, 2017.** In the Notice of Motion the 1st and the 3rd Respondents seeks the following: -

(i) Court grant leave to file and serve their response out of time as provided by the Rules.

(ii) That the response filed by the 1st and the 3rd Respondents on 26th September 2017 be deemed as duly filed.

(iii) That Court do grant any other orders that it may deem fit and just to grant.

39. The two Notices of Preliminary Objections deal with the issue of this Court's lack of jurisdiction to entertaining the 1st, the 2nd and the 3rd Respondents applications seeking extension of time to file their responses out of time and as such the two notices of preliminary objections were dealt with together as one Notice of Preliminary Objection.

40. Mr. Omari, Learned Advocate, for the Petitioner urged that the Petition was filed on 6th September 2017, served on 7th and 8th September 2017 and through newspaper advertisement on 10/9/2017. That the 1st and the 3rd Respondents were to file their response within 7 days as provided by **Rule 11 of the Elections (Parliamentary and County Elections). Petitions Rules, 2017,** but instead the response by the 1st and the 3rd Respondent was filed on 26/9/2017 being late by 11 days and without court's leave for enlargement of time. He similarly urged the 2nd Respondent's response filed on 22/9/2017 was also filed out of time and without Court's leave. He prayed that the 1st, the 2nd and 3rd Respondents applications be struck out.

41. Mr. Maloba, Learned Advocate, opposed the Petitioner's application dated 2nd October 2017 and the Notice of preliminary objections dated 5th October 2017 and 9th October 2017. He urged that it is not disputed the Responses were filed out of time and without leave of the court but urged the delay is sufficiently, explained in the Replying affidavit of 4/10/2017, urging he made an error on the law and the witnesses were teachers who he could not get in good time to record their statements. He pleaded with the Court to deem the responses as duly filed and served. He referred to **Rule 5(1) and 19(1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**, urging the Court has jurisdiction to extend time.

42. Mr. Mogikonyo, Learned Advocate, for the 2nd Respondent opposed the notice of preliminary objections dated 6th October 2017 and urged that this court has jurisdiction to entertain the 2nd Respondent's application dated 5th October 2017.

43. In Election Disputes, the jurisdiction of a court to entertain an election dispute often turns on whether the Petitioner or the Respondent has observed the set down timelines prescribed by law. There are timelines prescribed under the **Constitution and the Election Act No. 24 of 2011**, which are not extensible, yet there are timelines set out by the **Elections (Parliamentary and County Elections) Petitions Rules, 2017** which in my view are not inflexible and inextensible as the Court has unfettered jurisdiction to make appropriate orders as per facts of each case and in the interest of justice.

44. **Rule 11(1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** provides thus: -

"11. (1) Upon being served with a petition in accordance with Rule 10, a respondent may oppose the petition by filing and serving a response to an election petition within seven days."

In view of the above Rule, the 1st, the 2nd and the 3rd Respondents were required to file their respective responses within 7 days from the date of service. Their responses filed on 26/9/2017 and 22/9/2017 respectively, were filed after 7 days had lapsed hence out of time and without the leave of the court as submitted by the Advocate for the Petitioner.

45. **Rule 5(1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** states as follows as regards compliance with the Election Rules

"5. (1) The effect of any failure to comply with these Rules shall be determined at the Court's discretion in accordance with the provisions of Article 159 (2)(d) of the Constitution."

Further under **Rule 19(1)(2) of Elections (Parliamentary and County Elections) Petitions Rules, 2017**; it is provided thus; -

"19. (1) Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an elections court, the election court may, for the purposes of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the Court may have expired."

(2) Sub-rule (1) shall not apply in relation to the period within which a petition is required to be filed, heard or determined."

46. The Objective of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017** are

well set out under **Rule 4(1)(2)** of the aforesaid Rules as follows: -

“4. (1) The objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of elections petitions.

(2) An election court shall, in the exercise of its powers under the Constitution and the Act, or in the interpretation of any of the provisions in these Rules, seek to give effect to the objective specified in sub-rule (1).”

Whereas **Article 159(2)(d)** of the **Constitution of Kenya 2010** provides: -

“159. (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles: -

(d) justice shall be administered without undue regard to procedural technicalities; and.....”

47. I have very carefully considered the Rules; I have quoted herein above and my humble view is that in an Election dispute, though timeliness are of paramount importance an Election Court has jurisdiction to extend timelines prescribed in Procedural Rules or in cases where court gave directions fixing timelines, by virtue of **Rule 19 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**. I find and hold that this Court has unfettered jurisdiction to hear and determine an application filed for extension of time and any application filed under the **Elections (Parliamentary and County Elections) Petitions Rules, 2017**, save for where the period within which a petition is required to be filed, heard or determined. The timelines set by **Constitution** and the **Election Act** are inflexible and inextensible.

48. In **Raila Odinga & 5 Others V IEBC & 3 Others 2013[eKLR]**, the Supreme Court stated: -

(a) “Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court.

(b) A party who seeks for extension of time has the burden of laying a basis to the satisfactory of the Court.

(c) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.

(d) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court.

(e) Whether there will be any prejudice suffered by the Respondents if the extension is not granted.

(f) Whether the application has been brought without undue delay and

(g) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

49. I have considered the applicants’ applications and reasons for delay, which can be attributed to counsel not being aware of the timelines within which the response was to be filed following the amendment of the rules reducing the period from 14days to 7days. The delay was not deliberate, as it

was made inadvertently. The blame is placed squarely on the Respondents Advocates and parties should not be made to suffer due to mistake of their counsel. The delay in my view is not unreasonable nor inordinate and the reasons given are in my view reasonable and if the application is rejected, the people of West Mugirango Constituency and the Respondents would suffer prejudice. Petitions are matters of public interest and in deciding to extend the time or not, public interest should be considered bearing in mind, Elections are conducted once every five (5) years and public should have the opportunity to have matters decided on merits and not purely on technicalities.

50. In **Kakuta Hamisi V Peris Tobiko & 2 Others HCEP 5 of 2013 (Nairobi)**, it was held: -

“The principles to be distilled from those cases are that the court should strike a reasonable balance: negligent and deliberate lapses should not go unpunished; inadvertent and technical procedural goofs should not be elevated to a fetish. Fundamentally, the court should have regard to the need to do justice in the circumstances of each case.”

51. In **Dickson Mwenda Kithinji V Gatirau Peter Munya and 2 Others HCEP 1 of 2013, (Meru)**, the Court held: -

“In view of the foregoing court has discretion to grant or not to grant extension of time for the purposes of ensuring that no injustice is done to any party. This is an election matter in which the members of the public and more specifically the people of Meru County have interest in having the same determined fairly and in accordance with the provisions of law. Justice demands that no party should be condemned unheard and that each party to a suit be afforded an opportunity to adduce evidence and challenge evidence. I find by refusing to grant this application would amount to doing injustice to all parties concerned. The delay in filing answer in time has been explained and the same is not inordinate. The 2nd and 3rd respondents have shown their desire to have this matter disposed expeditiously by having filed their answer and replying affidavit together with their application dated 5th April, 2013.”

52. In view of the above, I find and hold that this Court has jurisdiction to hear and determined the Respondents applications seeking extension of time within which to file their responses out of time. I find the two notices of preliminary of objections unmerited and dismiss the same.

53. On the application dated 2nd October 2017 by the Petitioner for Respondents' responses to the petition, to be struck out from the record for having been filed out of time and for want of jurisdiction to extend time for filing responses out of time and upon finding this Court has jurisdiction to extend time for filing responses out of time and upon finding the reasons given for delay being satisfactory to the Court, the application for striking out the response by the 1st, the 2nd and the 3rd Respondents is accordingly dismissed.

54. The Applications dated 4th October 2017 by the 1st and the 3rd Respondents and application dated 5th October 2017 by the 2nd Respondent are meritorious and accordingly are allowed.

55. **The Upshot is that: -**

a) Notices of Preliminary objections dated 6th October 2017 and 9th October 2017 by the Petitioner are dismissed.

b) Application dated 2nd October 2017 by the Petitioner is dismissed.

c) Application dated 4th October by the 1st and the 3rd Respondents is allowed as prayed.

d) Application dated 5th October by the 2nd Respondent is allowed as prayed.

Costs of the Applications shall be in the Cause.

DATED AND SIGNED AT NYAMIRA THIS 30TH DAY OF OCTOBER 2017.

J. A. MAKAU

JUDGE

ALL THE RULINGS

DELIVERED IN OPEN COURT.

In the presence of:

Court Assistants:

1. Karlbean K. Mobisa

2. Nancy Moga

Mr. Omari & E.M. Ndubi: for Petitioner

Mr. Maloba: for the 1st and the 3rd Respondents

Mr. Mogikoyo: for the 2nd Respondent

J. A. MAKAU

JUDGE



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