



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELECTION PETITION NO. 2 OF 2017

IN THE MATTER OF ELECTIONS ACT, 2011

AND

**IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTION) PETITION
RULES, 2017**

AND

**IN THE MATTER OF THE ELECTION FOR MEMBER OF NATIONAL ASSEMBLY FOR BONCHARI
CONSTITUENCY (CODE 261)**

BETWEEN

ZEBEDEO JOHN OPORE PETITIONER

VERSUS

I.E.B.C 1ST RESPONDENT

DAVID K. CHEROP..... 2ND RESPONDENT

JOHN OROO OYIOKA 3RD RESPONDENT

R U L I N G

1. Introduction;

This is a composite ruling in respect of 4 applications viz:

1. The application dated 26th September 2017 by the 3rd respondent seeking extension of time for filing and service of answer to the Petition and affidavits and that the answer to Petition and replying affidavits filed and served out of time be deemed to have been duly filed and served.

2. The application dated 2nd October 2017 by the 1st and 2nd Respondents seeking to have the court extend time for the filing and service of answer to the petition and witness affidavits and to deem the answer to Petition and replying affidavits filed and served out of time as duly filed.

3. The application dated 28th September 2017 by the Petitioner seeking to have the 1st and 2nd Respondents Response to Petition filed on 19th September 2017 and the affidavit of David K. Cherop struck out.

4. The application by the Petition dated 28th September 2017 seeking to have the 3rd Respondents response to the Petition filed on 21st September 2017, the Respondents replying affidavit and witness affidavits struck out.

2. The facts as they emerge from the 4 applications and the relevant affidavits are that this Petition was filed on 5th September 2017. During pre-trial, it was agreed that the effective service of the Petition on 3rd Respondent would be the one by means of a newspaper advertisement on 11th September 2017. The service on the 1st and 2nd respondent was on 8th September 2017.

3. Admittedly both responses by the 1st, 2nd and 3rd Respondents are filed out of time. The 1st and 2nd Respondents' response is filed on 19th September 2017 and that of the 3rd Respondent is filed on 21st September 2017.

4. Within this background the respective prayers as serialized in paragraph 1 of this ruling above are made.

Issues for determination:

1. Whether the court has the power/jurisdiction to extend time within which a response is to be filed.

2. If in the affirmative whether the 1st, 2nd and 3rd Respondents deserve the extension sought.

3. Based on 2 above should the responses and affidavits be struck out as prayed for by the Petitioner.

5. I have had due regard to the applications herein, the responses thereto and submissions by counsel. Issue No. 3 is in respect of the application dated 28th September by the Petitioner. The answer to issue 1 and 2 would answer issue No. 3. I therefore opt to answer the issues 1 and 2 first.

The Law

6. Article 159 2(d) of the Constitution 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;

7. Rule 11 (1) of the **Elections (Parliamentary and County Elections) Petition Rules, 2017** provides:

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 7 days.

Rule 19(1) provides:

19(1) Where an 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 and determined.

Rule 4 provides:

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

Rule 5(1) provides:

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.

8. From the outset, it is clear from Rule 19 that the election court has power to vary timelines on matters prescribed by the Rules or by the court. In **Charles Kamuren –vs- Grace Jelagat Kipchoim & 2 Others [2013] eKLR** the court stated:

“The time frames stipulated under Section 76(1) (a) of the Election Act are peremptory and an election court has no power to vary them. A petition must be filed within twenty eight days after the date of publication of the results and should also be served within fifteen days of presentation of the petition. We agree with the learned trial Judge that Rule 20 *only provides for extension of time for matters whose time is prescribed by the Rules or by the court but not those prescribed by the Act.*”

9. However, the discretion under Rule 19 cannot be liberally exercised. An election petition is a special proceedings complete with strict timelines governed by the Constitution, the Elections Act and the Rules and Regulations made thereunder.

10. This position is best captured in the Indian Supreme court decision in **Arikala Narasa Reddy –vs- Venkataram Reddy Reddygari & Another (Civil Appeal Nos 5710-5711 of 2012)** where the Court stated:

“It is settled legal proposition that the statutory requirements relating to election law have to be strictly adhered to for the reason that an election dispute is a statutory proceeding unknown to the common law and thus, the doctrine of equity, etc. does not apply in such dispute. All the technicalities prescribed/mandated in election law have been provided to safeguard the purity of the election process and courts have a duty to enforce the same with all rigours and not to minimize their operation...a right to be elected is neither a fundamental right nor a common law right, though it may be very fundamental to a democratic set-up of governance. Therefore, answer to every question raised in election dispute is to be solved within four corners of the

statute.....”.

11. Be thus as it may, and within the discretionary powers donated under Rule 19 of the **Elections (Parliamentary and County Elections) Petition Rules, 2017**, the needs to do justice certainly require the court to exercise its discretion based on the circumstances of each case.

12. This would be in line with the objective of the rules which as stated in Rule 4 of the **Elections (Parliamentary and County Elections) Petition Rules, 2017** is:

“...to facilitate the just expeditious resolution of elections petitions.”

13. This court is bound, based on the circumstances of each case, to in the words of Rules 4 (1), (2) and Rule 5(1):

“...to facilitate the just expeditious, proportionate and affordable resolution of election petitions and to determine any failure to comply with the rules in accordance with Article 159 (2) (d) of the Constitution.”

14. All the while, in giving this accommodation, the court will be alive to the fact that the rules or directions of court are not made in vain as demonstrated by my earlier orders in this matter on the 19th October 2017.

15. From the foregoing, it is crystal clear that the court has the jurisdiction and discretionary power to grant the prayers sought.

16. I need to get out of the way an issue raised by the Petitioner about the supplementary affidavit sworn by the 3rd Respondent on 18th October 2017 in which the 3rd Respondent seeks to rectify what is stated to be a typographical error.

17. It is the submission by counsel for the Petitioner that sufficient explanation has not been given by the 3rd Respondent for the said typographical error.

18. In my ruling dated 19th October 2017 in respect of an application to admit a supplementary affidavit to correct a typographical error, I stated:

“... this renders credence to the fact that the indication of the same date and time in paragraph 3 was from some inadvertent error and which I am satisfied is explained.”

19. Thus this issue cannot be regurgitated and re litigated over again.

20. On whether the 1st, 2nd and 3rd Respondents deserve the extension sought, I have considered the reasons given and the period of delay.

21. For the 1st and 2nd Respondents, it is explained that the Petition was served on the 8th September 2017. Instructions to the advocates was on 11th September 2017. The Advocates sought the 2nd Respondent to travel to Nairobi to study the file and come up with a response to the Petition. The 2nd Respondent had to avail all forms and various polling station diaries for all polling stations for purposes of filing a response.

22. The documents were bulky and they led to breakdown of the photocopy machine in use. It took the

2nd Respondent 3 days to have the copies made.

23. He then had to travel to Nairobi where he worked on the response with the advocates on 14th and 15th September 2017 till late in the night. A clerk was dispatched to file the documents in Kisii on 18th September 2017. He had a troubled journey, arrived late and was only able to file the documents on 19th September 2019.

24. I have considered this explanation and note that the period out of time is 4 days. I have noted the nature and spread of evidence that the 1st and 2nd Respondents needed to gather, the 1st Respondent being the body mandated to conduct and oversee elections in the entire subject constituency. I have factored in the distance from Kisii to Nairobi where their counsel's offices are housed.

25. Beyond that, I cannot shut my eyes to the great public interest arising from this matter specifically affecting all voters in the subject constituency.

26. Am persuaded that the circumstances faced by the 1st and 2nd Respondents, the short period of delay and the public interest involved militate towards giving accommodation to the 1st and 2nd Respondents to defend this litigation. Any order to the contrary would occasion a miscarriage of justice of monumental proportion to the voters in Bonchari Constituency. It is in the interest of justice that all matters relevant to the case be placed before the court to enable a just and fair determination of who their representative in the National Assembly should be.

27. As regards the 3rd Respondent, it is deponed that the 3rd Respondent got Notice of the Petition from one of his supporters who had seen an advertisement in the newspaper.

28. The 3rd Respondent travelled to Nairobi on the 12th September 2017. He got in touch with his preferred advocates. It took him close to 5 days to have all his intended witnesses availed to his advocates to record their testimonies. By the time affidavits in reply were executed and filed, time had lapsed.

29. The delay occasioned amounted to 3 days as the response and the replying affidavits were filed on 21st September 2019.

30. I have considered these explanations. Granted, it is for a party to employ all diligence, effort and the proper management of the brief by counsel to ensure they align within the laws.

31. I will however borrow from the dictum of **Ochieng, J. in Mwambome T. Chappu Mbwana –vs- Boy Juma Boy & 2 Others [2013] eKLR** where he stated:-

“The petitioners have not even suggested that they would suffer any injustice due to the extension of time. On the other hand, if the responses were struck out, the Respondents would become lame ducks literally. They would have absolutely no material of a factual nature, that they would rely upon in answer to the Petition. I am therefore convinced that the extension of time, as granted, was in the interest of justice for all parties.”

32. Am satisfied that allowing extension of time for the 1st and 2nd Respondents and for the 3rd Respondent will not prejudice the Petitioner at all and would do justice to all parties in this case and to the people of Bonchari Constituency.

33. With the result that I allow the application dated 26th September 2017 by the 3rd Respondent in terms

of prayer 1 and 2 and the application dated 2nd October 2017 by the 1st and 2nd Respondent in terms of prayers 1 and 2 with costs to the Petitioner.

34. The applications dated 28th September 2017 against the 1st and 2nd Respondents and the one dated 28th September 2017 against the 3rd Respondent cannot, in view of the above finding, stand. Same are dismissed with each party bearing its own costs.

Ruling dated, signed and delivered at Kisii this 9th day of November, 2017.

A. K NDUNGU

JUDGE

In the presence of:

M/s Moenge for the Petitioner

M/s Odhiambo for the 1st and 2nd Respondents

Mr. Odhiambo holding brief for Mr. Morara for the 3rd Respondent

Mr. Limo court assistant

A. K. NDUNGU

JUDGE



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