



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**ELECTION PETITION NO. 4 OF 2017**

**IN THE MATTER OF: THE ELECTIONS ACT, NO. 24 OF 2011**

**IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY & COUNTY ELECTIONS) PETITION  
RULES, 2017**

**MWAHIMA MWALIMU MASUDI.....PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**LUCIANA SANZUA, THE RETURNING OFFICER OF LIKONI**

**CONSTITUENCY OF THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION..... 2<sup>ND</sup> RESPONDENT**

**THE PRESIDING OFFICERS OF MAJENGO MAPYA/MUZDALIFA**

**POLLING STATIONS, LIKONI CONSTITUENCY OF THE**

**INDEPENDENT ELECTORAL AND BOUNDARIES**

**COMMISSION.....3<sup>RD</sup> RESPONDENT**

**MBOKO MISHI JUMA KHAMIS.....4<sup>TH</sup> RESPONDENT**

**RULING**

**The Applications**

1. This Ruling relates to the following three (3) applications which are interrelated:

(i) A Preliminary Objection dated 4<sup>th</sup> October, 2017 brought by the Petitioner.

(ii) An application for extension of time dated 9<sup>th</sup> October, 2017 brought by the 1<sup>st</sup> - 3<sup>rd</sup> Respondents.

(iii) Another application for extension of time dated 5<sup>th</sup> October, 2017 brought by the 4<sup>th</sup> Respondent.

### **The Preliminary Objection**

2. By way of a notice of preliminary objection dated 4<sup>th</sup> October, 2017, the Petitioner contends that the responses and applications of the Respondents should be struck off and/or expunged from the court record.

3. The Petitioner alleges that the Petition herein was filed on 6<sup>th</sup> September, 2017 and served upon the Respondents by way of advertisement through the Daily Nation on 9<sup>th</sup> September, 2017. The Petitioner claims that by virtue of Rule 11 (3) of the Elections (Parliamentary and County Elections Petitions) (Amendment) Rules, 2017, the Respondents were required to respond to the Petition within seven (7) days from the date of service.

4. It is the Petitioner's contention that the 1<sup>st</sup>-3<sup>rd</sup> Respondents filed their response on 25<sup>th</sup> September, 2017 and served it upon the Petitioner on 25<sup>th</sup> September, 2017, while the 4<sup>th</sup> Respondent filed her response on 18<sup>th</sup> September, 2017 and served it upon the Petitioner on 23<sup>rd</sup> September contrary to Rule 11 (3) of the Elections (Parliamentary and County Elections Petitions) (Amendment) Rules, 2017.

5. The Petitioner's case is that the responses were filed out of time and without leave of the court thus the responses are incompetent, unsustainable and incurable/fatally defective and must be struck and/or expunged from the court records.

### **Applications for extension of time**

6. By way of a notice of motion dated 9<sup>th</sup> October, 2017 and brought under Rule 4, 5 and 19(1) of the Elections (Parliamentary and County Elections) Petition Rules 2017 and Order 51 of the Civil Procedure Rules, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents sought the following orders:

**a) THAT this Honourable Court be pleased to extend time prescribed or limited for filing a Response to the Petition under Rule 11 of the Elections (Parliamentary and County Elections) Petition Rules 2017 to the 20<sup>th</sup> September 2017 when the Applicants herein filed their response to the Petition dated 20<sup>th</sup> September, 2017 and filed in this Honourable Court on the said date be deemed as duly filed.**

**b) THAT the costs of this application be in the cause.**

The application was supported by the grounds on the face of the application and those in the supporting affidavit of **AUGUSTUS WAFULA** sworn on 9<sup>th</sup> October, 2017.

7. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents/ Applicants allege that the Petition herein was filed on 6<sup>th</sup> September, 2017 and advertised on 9<sup>th</sup> September, 2017 and that the advertisement indicated that the Respondents had fourteen (14) days to respond to the Petition.

8. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents claim that their advocates, the firm of Cootow & Associates, was instructed on 12<sup>th</sup> September, 2017 and when the said firm studied the Petition it was apparent that some materials had to be supplied to the court including Forms 35 A from all the polling stations, Forms 35B and all the polling stations diaries.

9. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents contend that they filed their responses on 20<sup>th</sup> September, 2017 well within

the 14 days prescribed in the advert although the responses fell outside the time limit prescribed by Rule 11 of the Elections (Parliamentary and County Elections) Petition Rules 2017.

10. It is the 1<sup>st</sup> to 3<sup>rd</sup> Respondents' case that the delay in filing their responses was not deliberate and that this court has powers under Rule 19 (1) to extend the time and admit the responses and documents filed by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents.

11. Similarly, as a response to the Preliminary Objection by the Petitioner, the 4<sup>th</sup> Respondent by way of a notice of motion dated 5<sup>th</sup> October, 2017 brought under Rule 5(1) and 19(1) of the Election Petition Rules, sought the following orders:

**(a) An Order that the 4th Respondent's Response to this Petition, dated 15th September 2017 and filed in Court on the 18th September 2017, was timeously filed.**

**(b) In the alternative and without prejudice to prayer (a) above, the Court do extend time for the filing of the said Response to 18th September 2017 and thus deem the same as dully filed.**

**(c) Costs of this application be in the cause.**

This application is premised on the grounds on its face and those in the supporting affidavit of **MISHI MBOKO JUMA KHAMIS** sworn on 6<sup>th</sup> October, 2017.

12. The 4<sup>th</sup> Respondent, as did the 1<sup>st</sup> to 3<sup>rd</sup> Respondents, contend that once the Petition was filed on 6<sup>th</sup> September, 2017, it was advertised in The Saturday Daily Nation of 9<sup>th</sup> September, 2017 and from that advertisement the respondents were to respond within 14 days from the date therein.

13. The 4<sup>th</sup> Respondent claims that if the respondents were to respond within seven (7) days as alleged by the Petitioner, then the seven (7) days fell on 16<sup>th</sup> September, 2017 which was a Saturday. Therefore the 4<sup>th</sup> Respondent filed her response on the next working day, 18<sup>th</sup> September, 2017.

14. It is the 4<sup>th</sup> Respondent's case that there was no delay or intentional failure by her to file the response earlier than 18<sup>th</sup> September, 2017.

### **Hearing**

15. These applications came up for hearing on 18<sup>th</sup> October, 2017. Mr. Mongeri and Ms. Mayabi appeared for the Petitioner, Mr. Wafula for the 1<sup>st</sup> to 3<sup>rd</sup> Respondents, while Mr. Paul Buti appeared for the 4<sup>th</sup> Respondent.

16. Mr. Mongeri submitted that his preliminary objection was based on Rule 11 (1) of the Election Petition Rules, 2017. Counsel argued that the Respondents were required to respond to the Petition within seven (7) days upon service. Counsel contended that the Petition was filed on 6<sup>th</sup> September, 2017 and served on 9<sup>th</sup> September, 2017 and that seven (7) days ended on 16<sup>th</sup> September, 2017.

17. Mr. Mongeri submitted that the end of the seven (7) days fell on the 16<sup>th</sup> September, 2017 which was Saturday. However, Counsel stated that the election petition registry was open on the said day until midnight. Counsel therefore argued that the Responses filed by the Respondents; the 1<sup>st</sup> to 3<sup>rd</sup> Respondents on 20<sup>th</sup> September, 2017 and the 4<sup>th</sup> Respondent on 18<sup>th</sup> September, 2017, were filed out of the time provided by the Rules.

18. Mr. Mongeri submitted that the Respondents should have sought leave of the court to file their responses out of time, and since they failed to do so their responses should be struck off.

19. Mr. Wafula, for the 1<sup>st</sup> to 3<sup>rd</sup> Respondents, opposed the Preliminary Objection and argued that it did not raise an issue of pure law. Counsel contended that the Preliminary Objection raised an issue which required evidence to be adduced. That being so, the Petitioner should have filed an application to strike out the responses and not a Preliminary Objection.

20. Raising the defence of estoppel, Mr. Wafula submitted that when the Petition was advertised on 9<sup>th</sup> September, 2017 it indicated that the respondents should respond within fourteen (14) days. The implication being that the Respondents had to respond by 24<sup>th</sup> September, 2017. Counsel contended that the 1<sup>st</sup> to 3<sup>rd</sup> Respondents filed their joint response on 20<sup>th</sup> September, 2017 within the time limit indicated in the advertisement. Hence the Petitioner under the doctrine of estoppel is estopped from claiming that the 1<sup>st</sup> to 3<sup>rd</sup> Respondents did not comply. This is so because through the said advertisement the Petitioner had made a representation that the respondent had 14 days to respond. The Petitioner is therefore estopped from denying that representation.

21. Mr. Wafula submitted that the 1<sup>st</sup> to 3<sup>rd</sup> Respondents have filed an application for enlargement of time under Rule 19(1) of the Election Petition Rules which allows this court to enlarge the time and to consider the Response as duly filed.

22. On his part, Mr. Buti for the 4<sup>th</sup> Respondent, referred the court to Section 57 of the Interpretation and General Provisions Act. Counsel submitted that Saturday is one of the official non-working days thus the 4<sup>th</sup> Respondent's response was filed on the next working day, being Monday.

23. Mr. Buti submitted that contrary to Mr. Mongeri's submissions, it is not an agreed fact that the Mombasa Registry was open on Saturday, 16<sup>th</sup> September, 2017 up to mid-night, and that even if it was, the Interpretation and General Provisions Act makes it irrelevant. Counsel further contended that evidence would be required to establish whether or not the registry was open on Saturday, 16<sup>th</sup> September, 2017 and this would make the Preliminary Objection fail the test that provides that it should deal with an issue of pure law.

24. Mr. Buti submitted that the advertisement indicated that the Respondents should respond within fourteen (14) days and the 4<sup>th</sup> Respondent relied on this assurance and filed her response on 18<sup>th</sup> September, 2017 while not knowing that the advertisement was misleading.

25. With regard to the 4<sup>th</sup> Respondent's application for enlargement of time, Mr. Buti submitted that the application should be allowed and the 4<sup>th</sup> Respondent's response considered as filed and served timeously.

26. In rebuttal, Mr. Mongeri submitted that the Respondents had all filed applications for extension of time which should be taken as evidence that they filed their responses out of time.

27. Mr. Mongeri reiterated that Saturday, 16<sup>th</sup> September, 2017 for purposes of election petitions was a working day within the meaning of Section 57 of the Interpretation and General Provisions Act. Counsel prayed that this court do conclude that there is no response to the Petition herein and to allow the parties move on to formal proof the Petition.

### **Analysis and Determination**

28. Having carefully considered the submissions of the parties, the issue that arises for determination is whether the responses filed and served upon the Petitioner by the Respondents should be struck off or whether the time for filing the said responses should be extended and the responses be deemed as duly filed.

29. Rule 11(1) of the Elections Petition (Parliamentary and County Election) Petition Rules, 2017 previously provided that:

**“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 fourteen days.”**

However, Rule 11 was amended by Legal Notice No. 117, published on 27<sup>th</sup> July 2017 which stated as follows.

**“3. Rule 11 of the principal Rules, is amended in paragraph (1) by deleting the words “and serving a response to an election petition within fourteen days” and substituting therefor the words “a response to an election within seven days.”**

30. The amendment is clear that a respondent may oppose a petition by filling and serving a response within seven days from the date of being served with the petition. The Respondents do not deny that the petition was served by way of advertisement on 9<sup>th</sup> September, 2017 through the Daily Nation and that they respectively filed their submissions on 20<sup>th</sup> September, 2017 for the 1<sup>st</sup> to 3<sup>rd</sup> Respondents and on 18<sup>th</sup> September, 2017 for the 4<sup>th</sup> Respondent.

31. However, all the Respondents argue that the advertisement that was placed on the Daily Nation indicated that the Respondents were supposed to respond to the Petition within fourteen (14) days. A copy of the said advertisement is attached to the affidavit of **AUGUSTUS KHISA WAFULA** and marked as **“AKW-1”**. Reading through the copy of the advertisement, the Respondents appear to have a point. At the bottom of the advertisement it reads:

**“AND further take notice that unless you enter an appearance within 14 days, the Petition will be heard in your absence.”**

32. The Petitioner states that the Respondents should have been aware of

the amendment and in essence disregard the 14 days on the advertisement. The Respondents on the other hand contend that they relied on what was indicated on the advertisement and the Petitioner should be estopped from going back on his representation.

33. Timelines are established to govern election petitions for a reason. This is to ensure the timely disposal of election petitions and to avoid situations where any party decides to move the court going by his or her own timelines. In the case of **Nicholas Kiptoo Arap Salat vs. IEBC & 7 others [2014] eKLR**, the Supreme Court had the following to say about time:

**“Time is a crucial component in dispensation of justice, hence the maxim: Justice delayed is justice denied. It is a litigant’s legitimate expectation where they seek justice that the same will be dispensed timeously. Hence, the various constitutional and statutory provisions on time frames within which matters have to be heard and determined. Time is of more essence in election matters where the people’s sovereign power to elect their legal representatives is involved. It is with this recognition that the Constitution provides for the time frames within**

**which election matters have to be heard and determined.”**

Also in the case of **Lemaken Aramat vs. Harun Meitmei Lempaka & 2 others [2014]**, the Supreme Court emphasized the relevance of timelines by stating:

**“...The parties have a duty to ensure they comply with their respective time-lines, and the court must adhere to its own. There must be fair and level playing field so that no party or the court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions or inadvertences which were foreseeable or could have been avoided.”**

34. While this court appreciates the purpose of timelines, this court is also guided by the need to do justice not only for the parties but also the residents of Likoni Constituency.

35. Rule 4 of the Election Petition (Parliamentary and County Election) Petition Rules, 2017 states that:

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

This Rule is an embodiment of Article 159 (2) (a) and (b) of the Constitution.

36. While Rule 11 (1) of the Election Petition (Parliamentary and County Election) Petition Rules, 2017 provides for response within seven (7) days, Rule 19 provides for the extension of time. Rule 19 of the Election Petition (Parliamentary and County Election) Petition Rules, 2017 states:

**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 election 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 filed, heard or determined.**

37. Rule 19 gives this court the discretion to extend time or limit time in order to ensure that justice is done. In this instance, the Petitioner had a duty to serve the Respondents with the Petition and he chose to do so by way of advertisement. A keen look at the copy of the advertisement shows that the Petitioner adopted the format prescribed under Form 3 in the First Schedule to the Election Petition (Parliamentary and County Election) Petition Rules, 2017. The prescribed form under the said Rules leaves a blank on the area to be indicated the number of days within which a Respondent is supposed to enter appearance. The Petitioner herein while in full knowledge that the number of days should be seven (7) days choose instead to indicate fourteen (14) days. This may have been a mischievous act on the part of the Petitioner. But if it was not intentionally done, then it created a misrepresentation the consequences of which cannot lightly be visited upon the Respondents, despite the facts that the Respondents ought to have known that a response was to be filed within 7 days of service.

38. Apparently in that knowledge, the Respondents have applied for the extension of time so that their responses filed outside the prescribed of seven (7) days can be considered as duly filed. The Supreme Court in the case of **Nicholas Kiptoo Arap Salat vs. IEBC & 7 others (supra)** enumerated the principles to be considered in extension of time for filing an appeal as:

**“1. 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.**

**2. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court;**

**3. Whether the court ought to exercise the discretion to extend time, is a consideration to be made on a case by case basis;**

**4. Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the court;**

**5. Whether there would be any prejudice suffered by the respondents if the extension of time was granted;**

**6. Whether the application had been brought without undue delay; and**

**7. Whether in certain cases, like election petitions, public interest ought to be considered for extending time.”**

Although the Supreme Court enumerated these principles in relation to extension of time to file an appeal, I do not find any reason why these principles cannot be used as a guide in the instant applications for extension of time.

39. The Respondents’ reason for delay is that they relied on the representation made by the Petitioner in the advertisement and that they did not intentionally or willfully file their responses late. This court has the discretion to determine whether this reason is sufficient. Taking into account the conduct and the behavior of the Petitioner as described under paragraph 37 of this Ruling, I find this reason to be sufficient.

40. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents filed their application for extension on 9<sup>th</sup> October, 2017 while the 4<sup>th</sup> Respondent filed her application for extension of time on 5<sup>th</sup> October, 2017. Interestingly, the Petitioner filed his Notice of Preliminary Objection on 5<sup>th</sup> October, 2017. I am reluctant to conclude that the Respondents did not delay in filing their applications for extension of time. The Respondents seem to have only filed their applications in a bid to avert the effect of the preliminary objection filed by the Petitioner.

41. Taking all these into consideration, however, would justice be served if the Respondents’ responses are struck out" The Petitioner is challenging the election of the 4<sup>th</sup> Respondent as the Member of Parliament for Likoni Constituency. In order for this court to justly determine whether the 4<sup>th</sup> Respondent was validly elected, the responses of the Respondents will be vital. Further, election petitions are matters of public interest. The people of Likoni have a right to know their validly elected member of parliament. Article 50 of the Constitution provides for the right to fair hearing. This can only be achieved if all parties herein are given an opportunity to be heard.

42. I have also taken into account the fact that the Petitioner will not in any way be prejudiced if the applications for extension of time are allowed. On the other hand, if the responses are struck off, the Respondents may not have on record evidence to challenge the Petitioner's claims. In the case of **Raila Amolo Odinga & Another vs. Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR**, the Supreme Court, in dismissing an application to strike out and/or expunge from the Court records documents filed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents which were not served upon counsel for the Petitioners, had the following to say:

**“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 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> 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”.**

Similarly, in this case, if the preliminary objection of the Petitioner herein were to succeed, it would dispose off the case of the Respondents and that would not be a fair outcome in the pursuit of just determination of this Petition.

43. For these reasons the Preliminary Objection dated 4<sup>th</sup> October, 2017 is dismissed.

44. Exercising the mandate given to this court by Rule 19 (1) of the Election Petition (Parliamentary and County Election) Petition Rules, 2017, I allow the application by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents' dated 9<sup>th</sup> October, 2017. I also allow the 4<sup>th</sup> Respondent's application dated 5<sup>th</sup> October, 2017, and herewith extend time to the date when the responses were filed being 20<sup>th</sup> September 2017 for the 1<sup>st</sup> to 3<sup>rd</sup> Respondents, and 18<sup>th</sup> September, 2017 for the 4<sup>th</sup> Respondent. Orders are therefore made as follows:

**a) The Notice of Preliminary Objection dated 4<sup>th</sup> October, 2017 is dismissed.**

**b) The 1<sup>st</sup> to 3<sup>rd</sup> Respondents Response to the Petition filed on 20<sup>th</sup> September, 2017 and the 4<sup>th</sup> Respondents Response to the Petition filed on 18<sup>th</sup> September, 2017 are deemed as duly filed and served upon the Petitioner.**

**c) Costs shall be in the cause.**

**Dated, Signed and Delivered in Mombasa this 8<sup>th</sup> day of November 2017.**

**E. K. O. OGOLA**

**JUDGE**

In the Presence of:

Mr. Mongeri & Ms. Mayabi for Petitioner

Mr. Wafula for 1<sup>st</sup> to 3<sup>rd</sup> Respondents

Mr. Buti for 4<sup>th</sup> Respondent

Mr. Kaunda Court Assistant





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