



**REPUBLIC OF KENYA**

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

**ELECTION PETITION NO. 1 OF 2017**

**JOSEPH OBIERO NDIEGE.....PETITIONER**

**VERSUS**

**INDEPENDENT & ELECTORAL**

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

**JULIUS MWITA.....2<sup>ND</sup> RESPONDENT**

**PETER FRANCIS MASARA.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Notice of Motion dated 17<sup>th</sup> October 2017 prays for the following reliefs:-

**(1) That the honourable court be pleased to extend time for the petitioner to serve video evidence, the accompanying certificates and Affidavit out of time.**

**(2) The video evidence, the accompanying certificate and affidavit already filed be deemed properly on record.**

2. The application is supported by the affidavit of Charles Midenga counsel for the petitioner sworn on 17<sup>th</sup> October 2017. He also argued on behalf of his client that the said videos and photographs were left behind during the filing of the petition. He depones that the same shall not in any way prejudice the respondent as they shall have the chance to cross-examine the marker.

3. He further submitted orally that the said videos shows one Eric Onana confessing that he voted. He said that **Rule 19 of the Election Rules 2017** permits this court to entertain this application.

4. The 3<sup>rd</sup> Respondent vide the replying affidavit of his counsel Jared Kisera opposed the application arguing that the same was an afterthought. The said affidavit sworn on 9<sup>th</sup> November 2017 among others state that the videos were never marked or even identified during the time the petitioner was testifying.

5. Mr Kisera further submitted orally that the source and the makers of the same were not disclosed and that there were no certificate accompanying the same. He said that nowhere does the petitioner discloses one Odienge Odhiambo John as the maker or developer of the said evidence.

He argued that this were issues that ought to have been decided at pretrial level not when this matter had reached such an advanced stage.

6. Mr Oduor counsel for the 1<sup>st</sup> and 2nd Respondents associated himself with the sentiments of the 3<sup>rd</sup> respondent counsel. He went further to state that the only time the photographs are mentioned anywhere are in the affidavit of one Joan Akuom who has infact not testified on behalf of the Petitioner. He argue this court to disallow the application.

### **Analysis and Determination**

7. I have read extensively the rival pleadings herein as well as heard the oral submissions. All that the Petitioner/Applicant is asking this court is to admit the videos and the photographs out of time. The provisions of 19 of the Elections (Parliamentary and County Elections) Petition Rules 2017 are clear. The same 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 elections court, the election court may, for the purposes of ensuring that justice is 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.”***

8. The admissibility of the Electronic evidence is equally captured under **Section 78A, 106 A to 106I of the Evidence Act.**

9. For now I shall not dwell on veracity or otherwise of the same as I have not been invited to do so. The question however is whether they should be admitted out of time. Its admitted by the Parties herein that Election matters are almost suigeneries and time bound. Little room is left for parties to manouver once the same has been filed.

10. My reading of the supporting affidavit of Mr Midenga Advocate does not indicate the sufficient reasons why they failed to file the same within the stipulated time. In paragraph 5 he state that;

**“That the photos and videos were generated and prepared at the same time but owing to innocent inadvetence the videos were not presented at the time of filing the Petition (underlining mine)”**.

11. What is innocent inadvetence" Who failed to undertake his work" Was it the petitioner, his counsel or the maker of the photos and the video"

12. At the same time, I totally agree with the Respondent counsels that nowhere does the petitioner nor his witnesses during their testimony refer to the said pieces of exhibits. Infact the petitioner did not allude to the same in his supporting affidavit to the Petition nor the supplementary affidavit. As a matter of fact he did not mention anywhere that one Odienge Odhiambo John, prepared the same at any one time.

13. More significantly, it would have been appropriate in my view for the petitioner in person to swear an affidavit in support of the application as the issues at hand are factual. Perhaps the certificate as well as the affidavit of the said Odienge Odhiambo John prepared on 10<sup>th</sup> October 2017 and sworn on 10<sup>th</sup> October 2017 should have formed an annexure to the affidavit in support of this application.

14. It is true that the photographs are already on record and the petitioner has alluded to the same in his testimony. Nevertheless one Joan Janet Akuom who swore her affidavit on 4<sup>th</sup> September 2017 would be the relevant person to speak on them.

15. The Petitioner/Applicant has argued this court to exercise its discretion under Article 159 of the Constitution. Whereas nothing stops me from exercising the same I do not think that this is an appropriate matter to do so. Infact the Provisions of Rule 15(2) of the Election (Parliamentary and County Elections) Petitions 2017 are clear and are mandatory. The same state as follows;-

***15(2) “An election Court shall not allow any interlocutory application to be made on conclusion of the pretrial conference, if the interlocutory application have, by its nature, been brought before the commencement of the hearing of the petition.”***

16. Had the petitioner/Applicant made any significant references during his evidence in chief or even at cross-examination or even in his pleadings perhaps I would have exercised my judicial discretion. In any case the photos for instance are already on record and yet the petitioner did not deem it fit to make any appropriate application before commencement of the trial.

17. For now I do not think it will be appropriate to grant the orders. I do not find any sufficient reasons why the same were not filed within the stipulated time. The application is otherwise dismissed with costs to the Respondents.

**Delivered, signed, and dated at Migori this 27th day of November 2017.**

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**H.K. CHEMITEI**

**JUDGE**

**27/11/17**

**In the presence of:**

**Ang’awa for the Petitioner**

**Kisera for the 3<sup>rd</sup> Respondent and holding brief for Orego for 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

**Ruling read in open court.**



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