



**REPUBLIC OF KENYA**

**High Court at Nyeri**

**Election Petition 5 of 2013**

**WILSON NGINGA KIMOTHO**

.....**PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1<sup>ST</sup>  
RESPONDENT**

**ESTHER MURUGI MATHENGE.....2<sup>ND</sup>  
RESPONDENT**

**MARGARET LORNAH KARIUKI (NYERI CONSTITUENCY RETURNING OFFICER)...3<sup>RD</sup>  
RESPONDENT**

**RULING**

By a Notice of Motion dated 29<sup>th</sup> May, 2013 and made under **Rules 10 and 12** of the **Elections (Parliamentary and County Elections) Petition Rules, 2013 (Elections Petition Rules)**, the inherent jurisdiction of the court and all enabling provisions of the law, the Petitioner has moved this Court for its order for leave to file affidavits by witnesses in compliance with **Rule 12** of the **Elections Petitions Rules**. If leave is granted, the Petitioner would prefer the draft affidavits annexed to his affidavit in support of the motion be deemed as duly filed upon payment of the requisite fees.

Amongst the grounds given for the motion, the Petitioner contends that he inadvertently filed witness statements instead of the affidavits by witnesses which affidavits should have formed part of the Petition at the time of its filing. The Petitioner also acknowledges that under **Rule 12** of the Elections Petition Rules, the Petition and those affidavits must be filed contemporaneously. The Petitioner argues that if the application is allowed, none of the parties will suffer any prejudice.

The Respondents have opposed the application; the 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed a Replying Affidavit

sworn by Moses Kipkogei on 31<sup>st</sup> May, 2013 while the 2<sup>nd</sup> Respondent filed her Replying Affidavit sworn on 5<sup>th</sup> June 2013. The Respondents also filed written submissions in compliance with the directions of the court issued on 29<sup>th</sup> May, 2013.

When the motion came up for hearing on 10<sup>th</sup> June, 2013 the Petitioner's counsel made relatively brief submissions on his motion emphasising that it was a very straight forward application; perhaps it is for this reason that the Petitioner did not file any written submissions as directed by the court. Counsel submitted that instead of filing the affidavits by witnesses the Petitioner intends to call pursuant to **Rule 12(1) of the Elections Petition Rules**, he filed witness statements which he admits was an error on his part. Counsel submitted that this court has discretion to extend time within which such affidavits can be filed. He relied on the decision in **Nairobi High Court Election Petition No. 5 of 2013, Kakuta Hamisi versus Peris Tobiko and 2 Others**, where the court (Kimondo J) ruled that an election court has express power to enlarge time within which to file the response and replying affidavits to an election petition. Counsel urged this court to follow that decision and allow the motion as prayed.

The Respondents strenuously opposed the motion. Mr Munge for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents commenced his submission by stating that this court is a court of equity and whoever comes to it must come with clean hands for the court to exercise its discretion in his favour. The Petitioner, according to counsel, does not deserve any discretion to be exercised in his favour because his hands are soiled.

Counsel argued that it is now two months since the Petition was filed yet the pre-trial process is not complete thanks to the Petitioner's casual approach to his Petition. As an example of the Petitioner's lack of seriousness and honesty, counsel submitted that on 30<sup>th</sup> May, 2013, the court gave directions on the hearing of the Petitioner's motion herein; while the Respondents complied with the directions part of which required them to file and serve their replying affidavit, the Petitioner, contrary to evidence before court, denies that he was served in time. Again while the Petitioner alleges that he filed witness statements together with the Petition, he never filed any witness statements as alleged. The purported witness statements were filed long after the Petition had been filed.

Counsel also submitted that no sufficient reason has been given to warrant issue of the orders sought and the Petitioner's alleged inadvertence is in reality ignorance of the law which cannot be a basis for any application in law. Counsel has also taken issue with the Applicant's apparent long delay in lodging the application before court; it has taken the Petitioner almost two months to file the motion and no plausible reason has been proffered to explain the delay. Considering that the Applicant wants to introduce new evidence after the Respondents have responded to the Petition, the net effect of the application, if allowed, is to amend the petition. According to counsel, this will roll back the statutory schedule for completion of the Petition herein because the Respondents will need almost the same amount of time taken by the Petitioner to answer to the new issues raised. In asking the court to dismiss the Application counsel relied on the decision in the **Kakamega High Court Civil Case No. 209A of 1991, Philomena Ingosi Lumula versus Jackton Mwanzi** where the court (Kariuki J) held that an excuse of inadvertence amounted to lack of seriousness on the part of the counsel and for that reason refused an application of amendment of the defence. Counsel also referred the court to the decision in **Machakos High Court Petition No. 2 of 2013, Thomas Malinda Musau & 2 Others versus Independent Electoral and Boundaries Commission & 2 Others** where Lilian Mutende J struck out a witness affidavit from the court record because no sufficient reason had been given as to why it was not filed in time.

On his part counsel for the 2<sup>nd</sup> Respondent invited the court to consider that **Rules 10 and 12** of the **Elections Petition Rules** under which the motion is said to have been brought do not give the court any power to extend time to file affidavits which ought to have been filed together with the Petition and to that

extent the application is misconceived and incompetent.

Counsel noted that leave to file the motion herein had been granted on 17<sup>th</sup> May, 2013 and going by the court's directions that leave expired on 22<sup>nd</sup> May, 2013 long before the motion herein was filed on 30<sup>th</sup> May, 2013. He also argued that it was not clear from the Petitioner's motion to whom the alleged inadvertence should be attributed since the information on the face of the application contradicted that in the affidavit sworn by the Petitioner himself. Again counsel agreed with counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents that no sufficient reason had been given as to why the witness affidavits were not filed at all and more so why the Petitioner had to wait for almost two months before filing this application. The purported witness statements which are alleged to have been filed together with the Petition were not only filed out of time contrary to the Petitioner's allegations but were also not made under oath. If the application was going to be allowed, so the counsel argued, the 2<sup>nd</sup> Respondent would be prejudiced in a material way. Counsel referred me to paragraph 217 of the Supreme Court decision in **Petition No. 5 of 2013, Raila Odinga versus Independent Electoral & Boundaries Commission & Others** on resolution of election disputes. In the paragraph referred to the court said:

***“The rigid timeframe for the resolution of presidential-election disputes was not, in our opinion, conceived in vain at the time of constitution making process. From the terms of Article 140 of the Constitution, it is clear that expedition is of the essence, in determining petitions relating to presidential elections.”***

Counsel asked me to adopt the same reasoning in so far as the need to have this petition heard within the statutory time limits is concerned. Counsel asked the court to find that the decision of Kimondo J in **Nairobi High Court Election Petition No. 5 of 2013 (supra)** was actually in favour of the Respondents because, according to counsel, the court ruled that once a delay has been established, the next question is whether that delay is inordinate or inexcusable. In this case the delay is both inordinate and inexcusable because no sufficient reason had been given to explain it. For those reasons counsel asked the court to dismiss the Application with costs.

I have duly considered the application, the replies thereto and counsel's submissions. **Rule 12(1)** of the Elections Petition Rules provides thus;

***“12(1) A Petitioner shall, at the time of filing the Petition file an affidavit sworn by each of the witness whom the Petitioner intends to call at the trial.”***

Under **Rule 12(2) (a)** of the same Rules, any affidavit filed by the Petitioner's witness must contain the substance of the evidence on which the Petition is based. Pursuant to **Rule 12(3)** of those Rules a witness can only give evidence on behalf of the Petitioner if the affidavit has been filed. Where no affidavit is filed, the court may grant leave for a witness to testify on behalf of the Petitioner only where sufficient reason is given as to why the affidavit was not filed as required. This is as per **Rules 12 (4) (5)** of the **Rules**.

I understand **Rule 12** of the **Rules** to mean that a witness affidavit is a fundamental component of the Petitioner's petition if the Petitioner intends to call the witness to support his petition; it is a crucial document because it contains the substance of the evidence on which the petition is founded. This is the evidence that must be brought to fore at the earliest opportunity possible to, *inter alia*, alert the respondents of the case against them and more importantly enable them reply to petition substantively, from an informed point of view.

The Petitioner in this case filed the Petition that was only supported by his own affidavit. No affidavit or

affidavits of persons he intends to call as witnesses were filed. It would appear from the documents filed with the Petition on 10<sup>th</sup> April, 2013 that only the Petitioner was going to testify; this is because in a document dated 9<sup>th</sup> April, 2013 and titled "plaintiff list of witnesses" filed by the Petitioner only the Petitioner is named therein as the witness in this petition. It would therefore follow that the Petitioner was very clear in his mind from the beginning that it was only him who was going to testify in his petition; of course there would be nothing wrong with that option because the Rules do not suggest that a Petitioner must always call witnesses; however, where witnesses have to be called their affidavits must be filed in advance together with the Petition.

When the Petitioner files a motion almost two months after he filed the petition to be allowed to file witness affidavits of witnesses who have not been listed in his list of witnesses, it may legitimately be concluded that the application is not made in good faith and it is, at best, an afterthought. It is telling that the Petitioner claims to have inadvertently filed witness statements together with petition when no such statements were ever filed until almost a month after he filed the petition. The court finds it difficult to exercise its discretion in favour of the Petitioner who deliberately chooses to mislead it.

The court also notes that the Petitioner has been casual in his approach to the application. As early as 17<sup>th</sup> May, 2013, this court granted him leave to file this application; according to the court's directions the application ought to have been filed by 22<sup>nd</sup> May, 2013. Rather than file the application, the Petitioner chose to file another application to file a further affidavit in response to the Respondents' replies to the petition for which leave had already been granted. He later withdrew the application. Ultimately he neither filed the further affidavits for which leave had been granted nor the appropriate application within the stipulated time. To a large extent the applicant has been indolent and this lethargic approach to the application can only lead to the conclusion that he does not deserve the orders he is seeking.

Counsel has asked me to exercise my discretion in favour of the applicant and extend time within which to file the witness affidavits. Where circumstances dictate that discretion ought to be exercised in the Petitioner's favour, I would not hesitate to act accordingly, but where an application for such exercise of discretion is baseless, mala fides or is likely to prejudice not only the parties in the proceedings but also the proceedings themselves, I would be reluctant to grant such an application. In any event, exercise of discretion is not a secret weapon available to a judge to unleash at his own whims; wherever applicable, it is only a tool for fair and judicious administration of justice. There is no doubt that if the motion was allowed the statutory programme within which this petition is to be concluded will be scuttled to the detriment of the court, the respondents and even the Petitioner himself. Everybody will lose.

For the foregoing reasons the Petitioner's Motion dated 29<sup>th</sup> May, 2013 is dismissed. The costs thereof will abide the outcome of the Petition.

**Signed, dated and delivered** in open court on 14<sup>th</sup> June, 2013

Ngaah Jairus

**JUDGE**

**In the presence of:**

Court Clerk: **Ndungu/Njiru**

Counsel for the Petitioner: **Mr. Ombongi**

Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents: **Mr. Munge**

Counsel for the 2<sup>nd</sup> Respondent: **Mr. Wahome**



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