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Case Class:	Civil
Court:	High Court at Kabarnet
Case Action:	Ruling
Judge:	Edward Muthoga Muriithi
Citation:	Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR
Advocates:	Mr. Biko instructed by M/S Prof. Tom Ojienda & Associates, Advocates for the Petitioner, Mr. Kahiga instructed by M/S Mirugi Kariuki & Co. for the 1st and 2nd Respondent, Mr. Kipkoech instructed by Gordon Ogola, Kipkoech & Co. Advocates for 3rd Respondent
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Baringo
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Case Outcome:	-
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

ELECTION PETITION NO. 1 OF 2017

BETWEEN

MUSA CHERUTICH SIRMA.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION1ST RESPONDENT

THE ELDAM RAVINE CONSTITUENCY RETURNING OFFICER

(NDIRANGU PETER KURIA).....2ND RESPONDENT

MOSES LESSONET.....3RD RESPONDENT

RULING

1. This is a ruling on Preliminary Objections taken by the Counsel for the 1st and 2nd Respondent and for the 3rd Respondent by respective **Notice of Preliminary Objection** dated 12th October 2017 and 14th October 2017. I have considered the points of preliminary objection and respective submissions thereon by counsel for the parties.

2. The substance of the points in the notices of Preliminary Objection by the respondents were as follows:

i. 1st and 2nd Respondents' Notice of Preliminary Objection dated 12th October 2017 -

"NOTICE OF PRELIMINARY OBJECTION

1. THAT the application is bad in law, incompetent, and totally unsustainable and can only be struck out.

2. THAT the application is an abuse of process of court and is filed in gross violation of the law.

3. THAT the application is filed in contempt of Court and in total disregard of the directions given by the Court on 4th October, 2017

4. THAT the application is filed in utter disregard of the laws applicable and should be struck out.

5. THAT the application is an omnibus application that mixes distinct and separate issues and should not be entertained by the honourable court.

6. THAT the application especially in respect of prayer Nos 3, 5, 6 and 7 do not lie as no leave was sought as granted for the presentation of such prayers.

7. THAT the application purports to seek leave to amend the petition but there is no draft amended petition and the application cannot stand in the absence of the said proposed amendments.

8. THAT the application purports to seek the introduction of additional witnesses but their witness statements or affidavits (or draft statements/affidavits) are not annexed and therefore if allowed to stand would lead to situation whereby the Petitioner is stealing a match and engage in litigation through ambush.

9. THAT the application is *res judicata* in some respects.

10. THAT the application is premature as no report has been prepared by the Deputy Registrar to warrant the grant of the prayers sought ostensibly on the strength of the sealing activity by the Deputy Registrar.

11. On the whole the application is superfluous and fatally defective, incompetent and a non starter and should be struck out.”

ii. 3rd Respondent’s Preliminary Objection dated 14th October 2017 –

“1. That the application is *res judicata*.

2. That the application was not served in accordance with the orders of the court issued on the 4th of October 2017.

3. That the application in its tenor and import violates the orders of court issued on the 4th October 2017.

4. That the application is in violation of Rule 15(2) of the Elections (Parliamentary and County Elections) Petitions Rules 2017.”

3. The *locus classicus* of preliminary objections ***Mukisa Biscuits Manufacturing Co. Ltd. v West End Distributors Ltd.*** (1969) EA 696, 701 (per Newbold, P) held as follows:

“A Preliminary point is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....”

4. The issues raised in the Notices of Preliminary Objection filed by the respondents may only succeed to the extent that they accept the facts as set out by the petitioner and raise pure points of law whose determination finally disposes of the matter in issue. The Preliminary objections must fail if they raise an issue whose determination requires the court to consider and ascertain the applicable facts or urges the court to exercise its discretion in a particular way.

5. The Notice of Motion dated 11th October 2017 was filed pursuant to leave granted by the Court to so file after the counsel for the Petitioner indicated that he was seeking to amend the Petition and that he wished to introduce supplementary affidavits by experts. Counsel for the respondent did not oppose the grant of leave to file but indicated they would in their responses oppose the applications. The Court made orders on the 4th October 2017 as follows:

“1. Petitioner to file application for leave to amend and for filing of supplementary affidavits

within 7 days.

2. Respondents to file responses within 4 days.

3. Hearing of the applications for leave to amend and filing supplementary affidavits set for 16th October 2017 at 10.00am.”

6. Clearly, if the counsel for the petitioner did not comply with the orders of the Court made on 4th October 2017, that cannot be the basis of a preliminary point, as the gives discretion on the Court to extend time for the doing of anything required to be done by the Rules or an order of the Court. See Rule 19 Election (Parliamentary and County Elections) Petition Rules, 2017 which provides as follows:

“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.”

See also Rule 36 of the Election Petition Rules.

7. The Notice of Motion dated 11th October 2017 seeks the following substantive orders:

“NOTICE OF MOTION DATED 11TH OCTOBER 2017

*2.HAT an order does issue granting the petitioner **leave to introduce more witnesses and witness statements** specifically expert witnesses, to wit; a statistician, data analyst, IT expert and a document examiner/handwriting expert.*

*3. THAT an **order for scrutiny and verification of the ballot boxes** does issue at this interlocutory stage.*

*4.THAT an **order of amendment of the petition** does issue forthwith.*

*5.THAT 1st and 2nd Respondents were duty bound to **supply the petitioner with all election material** within their custody, which they have partially done through their responses to the petition thus an order of mandamus compelling the 1st and 2nd Respondents to supply all election materials do issue, and the Petitioner/Applicant be at liberty to amend the petition whereof accordingly in reflection of the potential adjustments therein.*

*6.Pending the hearing and the determination of the petition and subject to directions as the court may grant **an order for the opening of the ballot boxes and scrutiny of the votes for the following 24 polling stations; Emkwen Nursery. Koibilwo. Tripkatoi, Kipkunyang, Sigoro, Kibias, Kinjilul, Poror Primary, Momoniant, Eldama Ravine Town Hall, Kipsigot, Moringwo, Kaplombe, Sinende, Mochongoi, Kiplongon, Kapdenning, Seguton Nursery, Tarigo, Chemwswon, Nyakio, Tugumoi***

and Matipso Polling stations for the purposes of establishing the contents whereof and the reasons for the broken, missing and or irregularly fixed seals as observed upon the court order and exercise at Eldama Ravine on 6th October, 2017.

7. Any other order the Honourable may deem sufficient to grant in the interest of justice.”

Application for Amendment of the Petition

8. The Elections Act provides for amendment of the Election Petition under section 76 of the Act as follows:

“76. Presentation of petitions

(1) A petition—

(a) to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election in the Gazette and served within fifteen days of presentation;

(b) to seek a declaration that a seat in Parliament or a county assembly has not become vacant shall be presented within twenty-eight days after the date of publication of the notification of the vacancy by the relevant Speaker; or

(c) to seek a declaration that a seat in Parliament has become vacant may be presented at any time.

(2) A petition questioning a return or an election **upon the ground of a corrupt practice, and specifically alleging a payment of money or other act to have been made or done** since the date aforesaid by the person whose election is questioned or by an agent of that person or with the privity of that person or his agent may, so far as respects the corrupt practice, be filed at any time within twenty-eight days after the publication of the election results in the Gazette.

(3) A petition questioning a return or an election **upon an allegation of an illegal practice and alleging a payment of money or other act to have been made or done** since the date aforesaid by the person whose election is questioned, or by an agent of that person, or with the privity of that person or his election agent in pursuance or in furtherance of the illegal practice alleged in the petition, may, so far as respects the illegal practice, be filed at any time within twenty-eight days after the publication of the election results in the Gazette.

(4) **A petition filed in time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the election court within the time within which the petition questioning the return or the election upon that ground may be presented.**

(5) A petition filed in respect of the matters set out in subsections (2) and (3) may, where a petition has already been presented on other grounds, be presented as a supplemental petition.”

9. Under section 76 of the Elections Act, all types of election petition, however grounded, must be filed within 28 days of the publication of the election results in the Gazette. By sub-section (4) thereof, all amendments to the Election Petition must be made with leave of the Court within the 28 days of the publication of the election results in the Gazette.

10. Any amendment to the Petition **“for the purpose of questioning a return or an election upon an allegation of an election offence,”** could only have been done within the 28 days of the publication of the election results in the Gazette. The Petition herein was filed on within time on the 5th September 2017.

11. I have considered the decision of Onyancha, J. in ***AMINA HASSAN AHMED –VS- RETURNING OFFICER MANDERA COUNTY & 2 OTHERS, EP NO. 4 OF 2013 (2013) eKLR*** on the court’s power to grant amendment to an Election Petition, as material, that –

“The next issue is whether this court has power to grant an amendment to the Petition

The Respondents have submitted that the court neither has power to allow amendment under the Elections Act, 2011 nor under the Rules promulgated under Section 96(1) of the Elections Act aforesaid. The Petitioner, on the other hand, submitted that this court has wide and original jurisdiction to allow a suitable amendment. He added that Section 76(4) of the Act, is not restrictive but only names a few of the many instances where the court can exercise its wide jurisdiction to allow amendment.

I have carefully considered this issue. In my view and finding, neither the Elections Act nor the Rules donate any provision for amendment of an election petition except for the limited window found in Section 76(4) of the Elections Act, 2011 which states: -

“A petition filled in time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the election court within the time within which the petition questioning the return or election upon that ground may be presented.”

It is my finding from the above provision that the Elections Act, 2011 does not generally allow amendment of an election petition except where the following terms are complied with: that is to say: -

(i) the petition to be amended questions a return or an election result upon an allegation of an election offence and;

(ii) the amendment is sought from the election court within the 28 days prescribed by the Act for filing an election petition and;

(iii) the election court is willing to exercise its original discretion in favour of granting the amendment sought.

The above provision being statutory, must be interpreted and be complied with, strictly, especially because the statute itself, as earlier noted, is a special legislation. To that end, to argue that the Act is silent in relation to issues of amendment of an election petition, as did the Petitioner herein, is in my view, to get astray. This is because the Act has actually loudly pronounced the circumstances when an amendment may be granted by an election court. This also means that Section 76(4) of the Elections Act, 2011 has specifically taken away and/or restricted the original jurisdiction of this court to grant leave for amendment of election petitions. Mr. Oluoch further thought that Rule 17(1) (f) of the hereinabove stated Election Rules, might give this court jurisdiction to grant amendment of the petition. The court’s view, however, is that the power given to the court thereunder, is limited to granting orders for the furnishing of further particulars. Such limited power cannot be used to correct deformity in the election petition. The answer to the second issue, therefore, is that this court has no power or jurisdiction to grant amendment of this petition as sought by the Petitioner.”

12. While I respectfully agree with the learned judge on the special nature of the section petition proceedings and of the limited provision for amendment of a Petition for purposes of section 76(4) of the Elections Act, I do not agree that the Petition may never be amended for any other purpose including clarifying matters set out in the Petition. What an amendment cannot do is to question the election or a return on the ground of an election offence the Petition unless it is done with the period of 28 days after the publication of the results in the Gazette.

13. I consider that an Election Petition may be amended for **any other purpose** other than for **“for the purpose of questioning a return or an election upon an allegation of an election offence.”** say to correct dates, names, other particulars and any errors in the Petition, any time before hearing giving the respondents time to respond to the amendment, as necessary. The principle of amendment of pleadings in regular civil proceedings, that amendments before hearing should be freely granted if they can be done without injustice to the other side and that there is no injustice if it can be remedied by an award of costs must be applicable to the Election Petitions. **[Eastern Bakeries vs Castellino (1958) EA 461.**

14. Accordingly, a petitioner may amend his petition only to correct any errors in pleading and to the extent that it does not effect amendments **“for the purpose of questioning a return or an election upon an allegation of an election offence”** or introduce another cause of action which would be time barred under section 76 of the Elections Act. I consider that the requirement of Article 159 of the Constitution and section 80 (d) of the Elections Act that the court deals with petitions before it without undue regard to technicalities, must be such as to allow the court some latitude in dealing with applications for amendment which do not go to change, out of the statutorily prescribed time, the root of the cause of action set out in the Petition filed within time.

Application for Scrutiny

15. Section 82 provides:

“82. Scrutiny of votes

*(1) An election court may, on its own motion or **on application by any party to the petition, during the hearing of an election petition,** order for a scrutiny of votes to be carried out in such manner as the election court may determine.*

(2) Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off—

(a) the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorised to vote at that station; the vote of a person whose vote was procured by bribery, treating or undue influence;

(c) the vote of a person who committed or procured the commission of personation at the election;

(d) the vote of a person proved to have voted in more than one constituency;

(e) the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or

(f) the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts

causing it were notorious.

(3) *The vote of a voter shall not, except in the case specified in subsection (1) (e), be struck off under subsection (1) by reason only of the voter not having been or not being qualified to have the voter's name entered on the register of voters.*"

16. Rule 15 (2) of the Election Petition (National Assembly) Rules, 2017 provides as follows:

*"15. (2) An election court shall not allow any **interlocutory application** to be made on conclusion of the pre-trial conference, **if the interlocutory application could have, by its nature, been brought before the commencement of the hearing of the petition.**"*

17. An application for scrutiny under section 82 may be made any time **during the hearing of an election petition.**

18. An interpretation of Rule 15 (2) of the Rules that makes a limit in relation to an application for scrutiny as to when it must be made **before the commencement of the hearing of the petition**, would be **ultra vires** section 82 of the Elections Act which makes an application for scrutiny available any time during the hearing of the Petition. Any subsidiary legislation which is inconsistent with the Act within which it is made is ultra vires, null and void. See section 31 (1) of the Interpretation and General Provisions Act cap. 2 Laws of Kenya, which provides as follows:

"(b) no subsidiary legislation shall be inconsistent with the provisions of an Act;"

19. The Court must favour an interpretation that leaves the Rules consistent with the enabling Act. Such a construction is possible where the Court an application for scrutiny is not an **"interlocutory application [that] could have, by its nature, been brought before the commencement of the hearing of the petition"**. An application for scrutiny by its nature is made during the hearing of the Petition in accordance with section 82 of the Elections Act. It is also truly speaking not an interlocutory application within the meaning of the Rules as it may be sought as a means of determination of the central question in a Petition as shown in Rule 29 (1) of the Rules which provides as follows:

*"29. (1) The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing **the validity of the votes cast.**"*

20. In addition, an application for recount and retallying may, where it is the only question in the Petition is the votes garnered by the candidates, be made as an application for final determination as follows:

"28. A petitioner may apply to an elections court for an order to -

(a) recount the votes; or

(b) examine the tallying, if the only issue for determination in the Petition is the count or tallying of votes received by the candidates."

Res Judicata

21. Section 7 of the Civil Procedure Rules provides for the principle of res judicata as follows:

"7. Res judicata

*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, **and has been heard and finally decided by such court.***"

22. There was something of a contradiction in the argument by the respondents in urging the court to consider itself a statutory court not bound by rules of common law or equity and the Civil Procedure Rules citing the Indian Supreme Court case of **Jyoti Basu & Ors. v. Debi Ghosal & Ors. AIR 1982 SC983**, and yet urge a common law principle of *res judicata*. The Indian decision was cited in AMINA HASSAN AHMED V RETURNING OFFICER MANDERA COUNTY & 2 OTHERS[2013]eKLR, as follows:

*"while ruling on the nature or character of election petition legislation, the Supreme Court of India in the case of **JYOTI BASU & ORS VS DEBI GHOSAL & OTHERS** reported in*

AIR 1982 SC, 983, held that: -

.....An Election petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket..... (emphasis)

23. Even if the common law doctrine of *res judicata* applied to election petitions, it would not apply in this specific matter as there has not been a **determination** on the issues subject of the application. The Court in its ruling of 4th October 2017 deferred the consideration of certain prayers of the Notice of Motion until after the Pre-trial conference as follows:

"2. As the Court has not given directions on the pre-trial conference under Rule 15, the matters raised in prayers 8,9 and 10 of the Notice of Motion dated 25.9.17 which were presented as the live issues of the Notice of Motion shall be dealt with after the pre-trial conference directions set for the 4.10.17."

24. Prayers 8, 9 and 10 of the Notice of Motion dated 25th September 2017 were in the following terms:

"AMMENDED NOTICE OF MOTION of 25th September 2017

8. THAT all seals and their numbers as used on the ballot boxes upon the end of the voting exercise and the declaration of the Results for Member of Parliament Eldama Ravine Constituency be supplied to the petitioner pending the hearing and determination of the instant motion.

*9. Pending the hearing and the determination of the petition and subject to directions as the court may grant an order for the **opening of the ballot boxes and scrutiny of the votes** for all the polling stations 154 polling stations do issue for the purposes of establishing the validity of the votes cast in the said constituency.*

*10. Upon the making of the Order in prayer 5 and 6 above, an order do issue **for the recount of the***

votes of all and all ballots cast.”

25. There was no previous decision on the matter as the court has not dealt with the three prayers. The court only said that it would reserve the consideration of the prayers Nos. until after the pre-trial conference. The application for the orders in the prayers of the Notice of Motion dated 11th October 2017 repeating the prayers of Notice off Motion dated 4th October 2017 is while not ***in substance*** a new application filed after the Pre-trial Conference in terms of Rules 15 (2) of the Election Rules, 2017, irregular because the court has yet to determine the previous application thereon. When at the pre-trial conference, the counsel for the petitioner indicate his wish to amend the petition and file additional affidavits, the court thought it expedient to rule on the two applications at the same time after the hearing of the second application then to be filed.

26. As pointed out at the outset, the question whether in the amended Notice of Motion complied with the order of the court is a matter of fact, which the court made on 4th October 2017 must ascertain before making a determination one way or the other. The court must consider what the Petitioner has filed against the orders of the court. It is not a proper subject of an application for striking out by a Notice of Preliminary Objection.

Application for leave to file additional affidavits

27. Rule 12 (3) and (9) of the Election Petition Rules requires persons to be called as witnesses in an election petition to file affidavits and the Court has power to grant leave to file additional affidavits as follows:

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

.....

(9) The election court may, on its own motion or on the application by any party to the petition, direct a party or witness to file a supplementary affidavit.”

28. The Petitioner may not be restricted from pursuing an order for the filing of supplementary affidavit which he is clear entitled under the Rules. If the respondents object to the affidavit or any parts of it, they should move the court in the usual for the striking out of the paragraph or the offensive parts thereof as permitted by Order 19 Rule 6 of the Civil Procedure Rules which is incorporated into the Election Petition Rules by reference in Rule 12 (14) as follows:

“(12) The Oaths and Statutory Declarations Act and Order 19 of the Civil Procedure Rules, 2010 shall apply to affidavits under these Rules”

Order 19 rule 6 of the Civil Procedure Rules, 2010 is the following terms:

[Order 19, rule 6.] Striking out matter.

6. The court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive.”

29. The matter of the affidavits are clearly in the discretion of the Court and, therefore, not suitable to be raised by way of preliminary objection.

Pre-trial Conference

30. Rule 15 of the Election Petition Rules provides as follows:

“15. (1) Within seven days after the receipt of the last response to a petition, an election court shall schedule a pre-trial conference with the parties in which the election court shall-

(a) frame the contested and uncontested issues in the petition;

(b) analyse methods for resolving the contested issues;

(c) determine interlocutory applications;

(d) confirm the number of witnesses the parties intend to call;

(e) give an order, where necessary, for furnishing further particulars;

(f) give directions for the disposal of the suit or any outstanding issues;

(g) give directions as to the place and time of hearing the petition;

(h) give directions as to the filing and serving of any further affidavits or the giving of additional evidence;

(i) give directions on limiting the volume of any copies of documents that may be required to be filed; or

(j) make such orders as may be necessary to prevent unnecessary costs”

31. Directions as to filing of additional affidavits may be given under Rule 15 (h) as shown above, even without a formal application for that purpose. The order for the filing of an application in this matter was made to give the respondents a chance to make any representation in response thereto, before the court exercises discretion in terms of the Rule.

32. I do not agree as suggested by the submissions of the respondents that pre-trial conference is **an event** which has long passed on the date the matter was first listed for pre-trial conference. I consider pre-trial directions to be **the orders and directions that court makes in preparation for the hearing of a suit**, or election petition in this case, with a view to achieving the overriding objectives of the particular process, herein set out in Rule 4 of the Rules as follows:

“4. (1) The objective of these Rules is to facilitate the just, expeditious, proportion

nate 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).”

33. The Court may make any directions in the nature of pre-trial directions any time before the commencement of hearing, and not necessarily on the very date that a pre-trial conference is held. Indeed, a court may on the pre-trial conference adjourn consideration of certain matters to a later date

before the trial. The injunction against the filing of interlocutory applications in Rules 15 (2) of the Election Petition Rules applies only after the pre-trial conference has given directions for and the hearing of the Petition has commenced or is set to commence on scheduled dates. Hence the use of the words “*on conclusion of the pre-trial conference*”. For a pre-trial conference to act as a bar to further applications, it must have been concluded. In this case the court has not set dates for the hearing of the election petitions, as the court had granted leave to file a supplementary affidavit and to move the court for amendment of the Petition, both which would require responses by the respondents. Pleadings have not closed, as it were and the petition is not ripe for commencement of hearing, and most definitely the pre-trial stage has not been concluded.

34. In addition, the application of the Rules to the election Petition before the Court is governed by substantial justice principle of Article 159 (2) (d) of the Constitution as prescribed by Rule 5 of the Election Petition Rules as follows:

“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.

(2) A party to a petition or an advocate for the party shall assist an election court to further the objective of these Rules and, for that purpose, to participate in the processes of the election court and to comply with the directions and orders of the election court.”

35. The application before the court for most part calls for exercise of discretion, and, consequently, the two Preliminary Objections by the respondents only partly succeed with respect to the application for amendment of the Petition if it is sought, “**for the purpose of questioning a return or an election upon an allegation of an election offence**”, and the repetition of application for orders among others for scrutiny at the interlocutory stage already before court by Notice of Motion dated 25th September 2017. The rest of the application will proceed to hearing on a date to be set in consultation with the counsel for the parties.

Orders

36. Accordingly, for the reasons set out above, the Preliminary Objections raised by the respondent respectively dated 12th October 2017 and 14th October 2017 are granted to the extent only that the Petition may not be amended if it is sought “**for the purpose of questioning a return or an election upon an allegation of an election offence**”. and with respect to the repetition of application for scrutiny and related orders which are already before the court, but in all other respects the preliminary objections are declined.

37. Consequently, the Court will hear the Notice of Motion dated 11th October 2017 on its merits with regard to the other prayers of the Motion.

38. Costs in the Cause.

DATED AND DELIVERED THIS 23rd DAY OF OCTOBER 2017.

EDWARD M. MURIITHI

JUDGE

Appearances: -

Mr. Biko instructed by M/S Prof. Tom Ojienda & Associates, Advocates for the Petitioner

Mr. Kahiga instructed by M/S Mirugi Kariuki & Co. for the 1st and 2nd Respondent

Mr. Kipkoech instructed by Gordon Ogola, Kipkoech & Co. Advocates for 3rd Respondent



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